



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

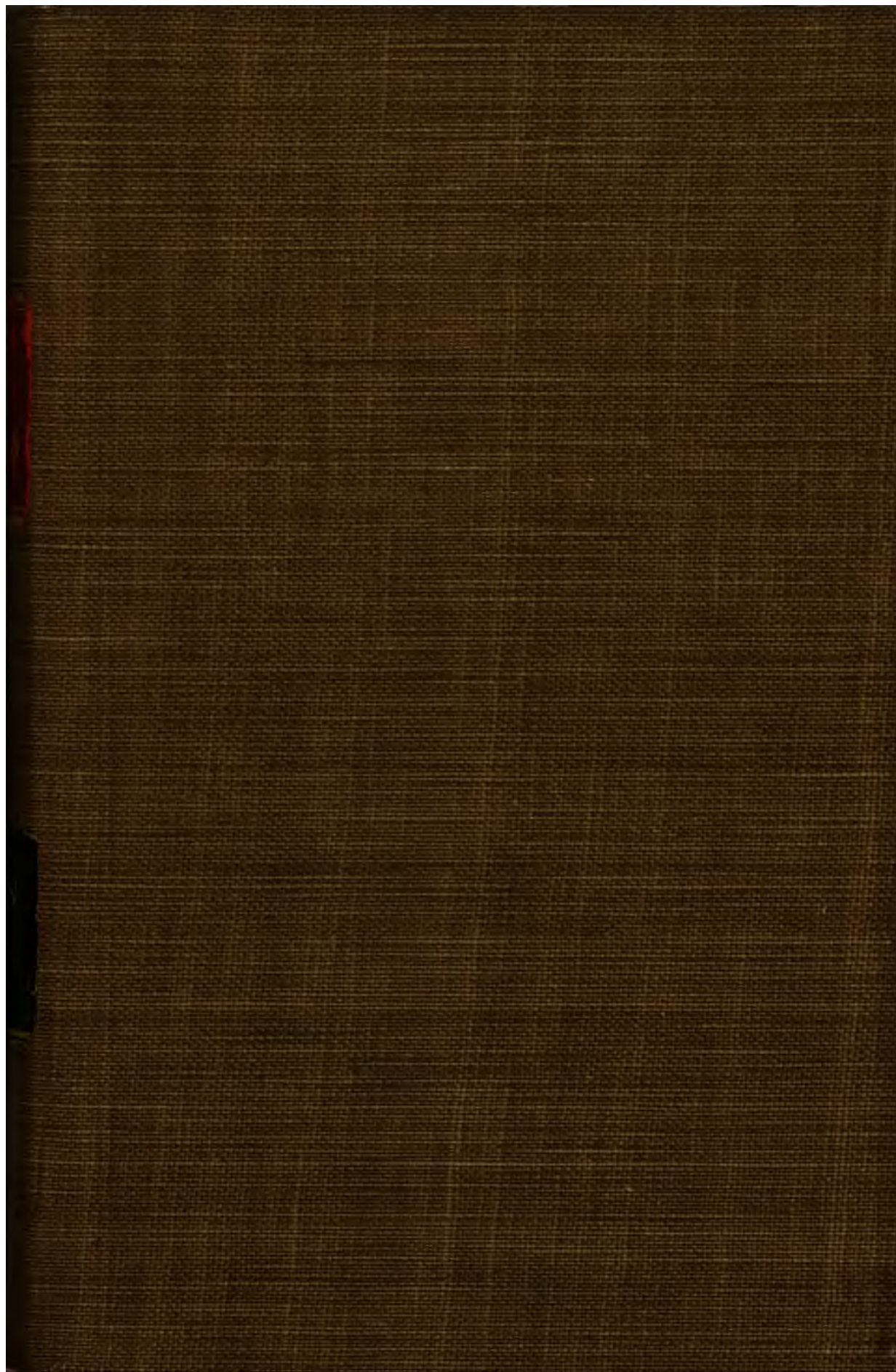
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





DJ
EMW
KRm
v.7



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

DJ
EMW
KRm
v.7

THE
MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED
ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,
OF THE COLORADO BAR.

VOL. VII.

CHICAGO:
CALLAGHAN & COMPANY.
1885.

Entered according to Act of Congress, in the year 1885,
By CALLAGHAN & COMPANY.
In the office of the Librarian of Congress, at Washington.

Stereotyped, Printed and Bound
by the
Chicago Legal News Company.

CASES REPORTED IN VOLUME VII.

- | | |
|--|---|
| Anderson v. Harvey's Heirs, 291. | Efford v. South Pacific C. R. R Co., 557. |
| Arnold v. Baker, 111. | Eldridge v. Wright, 418. |
| Arthur v. Griswold, 46. | Elwell v. Crowther, 438. |
| Banta v. Savage, 113. | Emma Mine Case, 493. |
| Bill v. Sierra Nevada Co., 413. | Emons v. McKesson, 409. |
| Blaisdell v. Stephens, 599. | Falls v. McAfee, 639. |
| Boyle v. Laird, 301. | Field v. Beaumont, 257. |
| Bracken v. Preston, 267. | Fremont v. Merced M. Co., 332. |
| Brennan v. Gaston, 424, 426. | Funk v. Haldeman, 203. |
| Burns v. McCabe, 1. | |
| Burnett v. Whitesides, 407. | Gear v. Shaw, 643. |
| Campbell v. Metcalf, 656. | Getty v. Devlin, 29, 119. |
| Capner v. Flemington Co., 263. | Gillett v. Treganza, 432. |
| Central R. R. Co. v. Standard Oil Co., 604, 628. | Grey v. Duke of Northumberland, 250, 251. |
| Clegg v. Jones, 572. | Grubb v. Grubb, 226. |
| Coker v. Simpson, 330. | |
| Cole M. Co. v. Virginia W. Co., 503, 516. | Hardy v. Stonebraker, 10. |
| Cowper v. Baker, 253. | Hawseville v. Hawse's Heirs, 193. |
| Creighton v. Vanderlip, 172. | Hellman v. Holladay, 168. |
| Daubenspeck v. Grear, 429. | Hicks v. Jennings, 138. |
| Davidson v. Jordan, 54. | Higgins v. Barker, 525. |
| | Irwin v. Davidson, 237. |
| Earl Cowper v. Baker, 253. | |
| Earl of Lonsdale v. Curwen, 693. | Jackson v. Allen, 127. |
| Edwards v. Allouez M. Co., 577. | Janes v. Scott, 181. |
| | Kahn v. Old Telegraph M. Co., 559. |

-
- | | |
|---|--|
| <p>Lady Bryan Co. v. Lady Bryan Co., 478.
Law v. Grant, 56.
Lawrence and others' Appeal, 542.
Leaming v. Wise, 41.
Leitham v. Cusick, 546.
Lockwood v. Lunsford, 532.
London, Bishop of, v. Web, 247.
Lonsdale v. Curwen, 693.
Lyon v. Woodman, 493.

Magnet Co. v. Page and Panaca Co., 540.
Mahony M. Co. v. Bennett, 133.
Mammoth Vein Co.'s Appeal, 460.
Mateer v. Brown, 156.
Merced M. Co. v. Fremont, 309, 313.
Mitchell v. Dors, 250.
Moore v. Ferrell, 281.
More v. Massini, 455.
Morgan v. Negley, 653.
Morgan v. Skiddy, 74.
Munson v. Tryon, 469.
McBrayer v. Hardin, 288.
McLaughlin v. Kelly, 435.

Newton v. Nock, 611.

Ogle's Estate, In re, 189.
Old Telegraph M. Co. v. Central S. Co., 555.</p> | <p>Real Del Monte Co. v. Pond Co., 452.
Rivers v. Burbank, 583.
Robertson v. Smith, 196.

Schuylkill and Dauphin Co. v. Schmoele, 480.
Slade v. Sullivan, 419.
Sherman v. Clark, 483.
Sierra Nevada Co. v. Sears, 549.
Smith v. Roune, City Council of, 306.
Streeter v. Marshall S. M. Co., 660.
Strelley v. Pearson, 618.

Thomas v. Oakley, 254.
Thorn v. Sweeney, 564.
Thornburgh v. Savage M. Co., 667.
Tuck v. Downing, 83.
Twaddell's Appeal, 189.

United N. J. R. R. & C. Co. v. Standard Oil Co., 625.
United States v. Parrott, 335.

Vanzandt v. Argentine M. Co. 634.

Waldron v. Marsh, 305.
Walling v. Miller, 165.
Wardell v. Union Pacific R. R. Co., 144.
Wentworth v. Turner, 249.
West Point Co. v. Reymert, 528.
Williams v. Spurr, 17.</p> |
|---|--|

TABLE OF CASES CITED IN VOLUME VII.

THOSE CASES PRINTED IN ITALICS ARE TO BE FOUND REPORTED
IN THE SERIES.

- | | |
|---|---|
| <p>Abbott v. Allen, 279.
 <i>Abinger v. Ashton</i>, 615, 617, 621,
 623. 6 M. R. 1.
 Ableman v. Roth, 13.
 <i>Ackerman v. Hartley</i>, 638. 1 M. R.
 74.
 <i>Ahl's Appeal</i>, 144, 153. 3 M. R.
 638.
 <i>Ahrens v. Adler</i>, 153. PLEADING.
 Ainslie v. Medlycott, 75.
 Alden v. Gregory, 63.
 <i>Alexander v. Cauldwell</i>, 156. 5 M.
 R. 650.
 Alexander v. Pendleton, 279.
 Allen v. City of Buffalo, 123.
 Allerton v. Belden, 123.
 <i>Allison's Appeal</i>, 636. ORE.
 Allport v. Kelley, 666.
 Almer v. Hiatt, 683.
 Amelung v. Seekamp, 320, 321.
 <i>Anderson v. Harvey</i>, 281, 305. 7 M.
 R. 291.
 Anderson v. Lemon, 14.
 <i>Anderson v. Simpson</i>, 257. LI-
 CENSE.
 Angier v. Agnew, 237.
 Arcambel v. Wiseman, 650.
 Arent v. Squire, 75.
 Arimond v. Green Bay Co., 578.
 <i>Arthur v. Griswold</i>, 76, 123. 7 M.
 R. 46.</p> | <p>Ashley v. Port Huron, 578.
 Attorney-General v. City of Pater-
 son, 500.
 Attorney-General v. Baliot College,
 507.
 Attwood v. Small, 155.
 Atwood v. Clark, 43.
 Auburn v. Douglass, 499.
 Audenried v. Phila. & R. R. 521.
 Austin Glass Co. v. Dewey, 511.
 Ayers v. Mitchell, 43.

 <i>Babcock v. Case</i>, 8. 6 M. R. 618.
 Backler v. Farrow, 380.
 Bailey v. Burton, 122.
 Bailey v. Inglee, 122.
 Bailey v. Ogden, 304.
 Baker v. Moody, 166.
 Baker v. Robins, 32.
 Ballston Spa Bank v. Marine Bank,
 64.
 Bank v. Devaux, 684, 685.
 Bank of Augusta v. Earle, 690, 691.
 Bank of Monroe v. Schermerhorn,
 542.
 Bankart v. Houghton, 577, 637.
 Banta v. Palmer, 91, 94.
 Barber v. Barber, 500.
 Barber v. Kilbourn, 13.
 Bard v. Yohn, 601.
 Barker v. Elkins, 262.</p> |
|---|---|

- Barksdale v. Finney*, 153. TRUST.
Barnes v. Quigley, 123.
Barney v. Baltimore City, 508, 518.
Bartle v. Coleman, 14.
Bassett v. Salisbury Mfg. Co., 569.
Beal v. Ins. Co., 64.
Bean v. Valle, 158, 155. SPEC. PERF.
Beatty v. Gregory, 573. LICENSE.
Beaufort v. Morris, 636.
Beaumont v. Boulbee, 153. 1 M. R. 253.
Beaumont v. Field, 258. 1 M. R. 281.
Bechtel v. Carslake, 571.
Beckford v. Kemble, 472.
Beddow v. Beddow, 620.
Beecher v. Gillespie, 122.
Beeker v. Hastings, 154. 2 M. R. 688.
Belcher Co. v. Deferrari, 643.
Bemis v. Upham, 579.
Bennett v. Judson, 30, 64, 75.
Benson v. Heathorn, 152.
Bently v. Craven, 37.
Bigelow v. Hartford Co., 571.
Bird v. Smith, 208.
Birmingham Co. v. Lloyd, 637. LACHES.
Bishop of Winchester v. Knight, 278.
Bissel v. Collins, 202.
Bittinger v. Baker, 210.
Blacoe v. Wilkinson, 260.
Blagden v. Bradbear, 804.
Blaine v. Chambers, 234.
Blake's Case, 31, 122.
Blake v. City of Brooklyn, 571.
Blake v. Mowatt, 43.
Blake v. R. R. Co., 122.
Blakemore v. Glamorganshire Co., 528.
Blakesley v. Whieldon, 620. 8 M. R. —
Blankman v. Vallejo, 117.
Blasdel v. Williams, 330.
Bliss v. Matteson, 31.
Bloodgood v. Bruen, 123.
Bogardus v. Trinity Church, 356.
Boggs v. Merced Co., 330. MEX. GRANT.
Bolling v. Tate, 644.
Bolt v. Rogers, 14.
Bonaparte v. Camden R. R. Co., 579.
Booth v. Discoll, 499.
Bosley v. McKim, 580.
Bowman v. Bates, 113. 6 M. R. 363.
Boyce v. Brown, 123.
Boyce v. Grundy, 349.
Boynton v. Hatch, 76.
Bradbury v. Davis, 154. 3 M. R. 403.
Bradley v. Bos'ey, 123.
Brandt v. McKeever, 234. LICENSE.
Breed v. Judd, 192. PROSP. CONT.
Brennan v. Gaston, 267, 547, 634. 7 M. R. 426.
Bridgman v. Green, 122.
Broderick v. Broderick, 63.
Bromley v. Jeffries, 304.
Brookman v. Hamill, 123.
Brooks v. Martin, 16.
Brown v. Ashley, 305, 429, 638. PLEADING.
Brown v. Brooks, 185.
Brown v. Caldwell, 278. REFLEVIN.
Brown v. Lynch, 14.
Brown v. Wier, 466.
Browne v. Moore, 696.
Browne v. Vredenburgh, 31.
Bruce v. Davenport, 124.
Bruce v. Del. & H. Can. Co., 454.
Bryan v. Berry, 428.
Buckman v. Brett, 123.
Burdge v. Smith, 422. PUB. DO-MAIN.
Burdge v. Underwood, 422. 4 M. R. 517.
Burgess v. Clements, 161.
Burgess v. Kattleman, 579.
Burgess v. Simonson, 31.
Burnett v. Whitesides, 454, 498, 500. 7 M. R. 407.
Bush v. Sullivan, 573. LICENSE.
Bushnell v. Church, 188. 2 M. R. 479.
Buskel v. Com. Ins. Co., 689.
Butler v. Haskell, 63.

- Butz v. Ihrie, 208.
Byard v. Holmes, 29, 111. 6 M. R. 598.
- Caldwell v. Fulton*, 206, 210, 217, 218, 221, 234. 3 M. R. 238.
Caldwell v. Knott, 499.
Calkins v. Smith, 123.
Calve's Case, 161.
Camp v. Bates, 378.
Campbell v. Fleming, 43. 6 M. R. 395.
Campbell v. Metcalf, 666. 7 M. R. 656.
Caples v. McBride, 154.
Capner v. Flemington Co., 237, 281. 7 M. R. 263.
Carpenter v. Danforth, 31.
Carpenter v. Hart, 428.
Castleman v. Griffin, 13.
Catching v. Terrell, 571.
Cavene v. McMichael, 648.
Central R. R. Co. v. Kish, 80, 81.
Central R. R. Co. v. Standard Oil Co., 625. 7 M. R. 604.
Chafin Will Case, 66.
Chalk v. Wyatt, 242.
Chamberlain, ex p., 310.
Chamberlain v. Barnes, 14.
Chambers v. Alabama Co., 494.
Chapman v. Toy Long, 254, 330. 1 M. R. 497.
Charles Riv. Br. v. Warren Br., 199.
Charnley v. Dulles, 43.
Chester v. Comstock, 76.
Chester v. Dickerson, 38, 75, 123.
Chesterfield v. Janssen, 63.
Chetham v. Williamson, 206, 209, 220. LICENSE.
Chidester v. Cons. Ditch Co., 599.
Citizens' Coach Co. v. Camden Horse R. R. Co., 609, 610.
City of Ottawa v. Ch. & R. I. R. R., 563.
Clapham v. Shillito, 113. 6 M. R. 431.
Clapham v. White, 360.
Clark v. Ascham, 43.
Clark v. Duval, 422.
- Clark v. Riemsdyk*, 361, 368.
Clark v. Willett, 460. 4 M. R. 628.
Clarke v. Dickson, 74, 76, 80, 83. 6 M. R. 523.
Clarke v. Hart, 257.
Clarke v. Mathewson, 348.
Clarkson v. DePeyster, 122.
Clavering v. Clavering, 454, 637. TENANT FOR LIFE.
Clemens v. Clemens, 16.
Clement v. Walter, 207.
Clement v. Youngman, 209. 5 M. R. 230.
Clerk v. Wright, 304.
Cleveland v. Pollard, 122.
Clinan v. Cooke, 304.
Clowes v. Staffordshire Co., 614.
Cobb v. Hatfield, 32, 39, 123.
Cobb v. Smith, 498.
Cockburn v. Thompson, 507.
Cockey v. Carroll, 579.
Cockrell v. Warren, 683.
Coggs v. Bernard, 221.
Coiron v. Millaudon, 346.
Cole Co. v. Virginia Co., 611. 7 M. R. 503.
Coleman v. Columbia Co., 549. 3 M. R. 483.
Coleman v. Morrison, 195.
Collins v. Case, 127. 1 M. R. 91.
Collum v. Andrews, 648.
Com. v. Hampden, 310.
Conger v. Weaver, 326. 1 M. R. 594.
Conkey v. Bond, 30, 32, 122.
Conybeare v. N. B. R. & L. Co., 31, 122.
Cook v. Nicholas, 235.
Cooke v. Chilcott, 614, 620.
Cooley v. Lawrence, 683.
Cooper v. Lovering, 54, 113. 6 M. R. 662.
Coos Bay Co. v. Crocker, 138.
Cope v. Grant, 234.
Corfield v. Coryell, 278.
Corning v. Troy Iron Factory, 530.
Coryell v. Cain, 116. 5 M. R. 226.
Coster v. Bettner, 75.
Courtney v. Turner, 592.

- Cousins v. Smith, 334.
 Craig v. Ward, 75.
 Crane, *ex p.*, 310.
 Crater v. Binninger, 153. MEAS. D.
 Crisman v. Heiderer, 305.
 Crompton v. Lea, 618. 6 M. R. 179.
 Cronk v. Cole, 13.
 Crump v. U. S. Co., 154. 3 M. R. 154.
 Cullen v. Thompson, 76.
 Cumberland Co. v. Sherman, 144,
 153. 1 M. R. 322.
 Cunningham v. Pell, 31.
 Curtis v. Smith, 122.
 Curtis v. Sutter, 454.
 Curtis v. Waring, 153.

 Daubenspeck v. Grear, 445, 568. 7
 M. R. 429.
 Davis v. Leo, 249, 362.
 Davoue v. Fanning, 32.
 Dawson v. Chamney, 161, 163.
 Day v. Brownrigg, 620.
 Day v. Newark Mfg. Co., 692.
 Day v. Potter, 123.
 Dayton M. Co. v. Seawell, 567. 5
 M. R. 424.
 Dean v. Chamberlain, 122.
 Dedham Bank v. Chickering, 14.
 Deep River Co. v. Fox, 637. 1 M.
 R. 296.
 DeGodey v. Godey, 559.
 Degraw v. Elmore, 123, 155.
 Dekay, *In re*, 434.
 Del. & Hud. Canal Co. v. Pa. Coal
 Co., 210.
 Delger v. Johnson, 561, 562.
 Delphi v. Evans, 202.
 Demott v. Hagerman, 278.
 Den v. Kinney, 266.
 Denny v. Brunson, 466.
 Densmore Co. v. Densmore, 153. 3
 M. R. 569.
 Des Moines v. Hall, 202.
 Denver v. Capelli, 547.
 Denver v. Clements, 193.
 Denver v. Lobenstein, 446.
 Derry v. Ross, 636. 1 M. R. 1.
 Dias v. Brunell, 122.
 Dill v. McGehee, 122.

 Disbrow v. Mills, 122.
 Dobbins v. Brown, 482.
 Dodge v. Strong, 262.
 Doe v. Wood, 206, 269, 221. LI-
 CENSE.
 Dore v. Dawson, 166.
 Doty v. Strong, 645, 646.
 Dows v. Smith, 43.
 Drury v. Cross, 152.
 Dubuque v. Benson, 202.
 Duckett v. Price, 666.
 Dugan v. Cureton, 13.
 Dunlap v. Richards, 14.
 Dunlap v. Stetson, 348.
 Dupont v. Payton, 13.
 Dutch W. I. Co. v. Moyes, 689.
 Duval v. Covenhoven, 122.
 Duvall v. Waters, 277.
 Dyer v. Homer, 16.

 Eakert v. Bauert, 691.
 Earl of Mixborough v. Brown, 515.
 East India Co. v. Kynaston, 693.
 Easton v. N. Y. & L. B. R. R., 631.
 Ecc. Com. v. N. E. Railway, 155.
 RELEASE.
 Echelkamp v. Schrader, 536.
 Elwell v. Chamberlain, 30, 64.
 Elwell v. Dodge, 75.
 Emma Mine Case, 237. 7 M. R.,
 493.
 Emma Co. v. Emma Co., 155, 637.
 Emmons v. McKesson, 155. 7 M.
 R., 409.
 Enfield Br. Co. v. Conn. R. Co., 579.
 Ensminger v. McIntire, 637. TRES-
 PASS.
 Eureka Co. v. Richmond Co., 637.
 8 M. R.—
 Eureka Co. v. Way, 593, 597.
 European Ry. Co. v. Poor, 152.
 Evans v. Smith, 332, 637.
 Everly v. Rice, 362, 363.

 Fabian v. Collins, 525, 572. 5 M.
 R., 20.
 Falkinburg v. Lucy, 561, 562.
 Falls v. McAfee, 637. 7 M. R., 639.
 Falmouth v. Innys, 516.

- Farmers Bank v. D. & M. R. R., 511.
- Farmers L. & T. Co. v. Carroll, 123.
- Farnum v. U. S., 180. 4 M. R., 192.
- Fargo v. Ladd, 14.
- Fawcett v. Whitehouse, 153. PARTNER.
- Fay v. New World, 180. 2 M. R., 417.
- Fellows v. Northrup, 31.
- Ferguson v. Hillman, 119.
- Ferguson v. Terry, 601.
- Field v. Beaumont, 258, 454, 577, 7 M. R., 257.
- Field v. Munson, 31.
- Fields v. Rouse, 13.
- First Nat. Bank v. How, 154. PLEADING.
- First Nat. Bank v. Marietta R. R., 168.
- Fisher v. Fields, 123.
- Fisher v. Fredenhall, 32.
- Fisher v. Mellen, 75.
- Fitz v. Bynum, 155. STOCK.
- Fitzgerald v. Urton, 422. POSSESSION.
- Fitzsimmons v. Joslin, 64.
- Flagg v. Mann, 122.
- Flagstaff Co. v. Patrick, 484. 4 M. R. 19.
- Flamang's Case, 250, 256, 357, 636.
- Fletcher v. Hawkins, 180, 188. PARTNER.
- Flint & P. M. Ry. v. Dewey, 152.
- Foley v. Cowgill, 13.
- Fortescue v. State Bank, 166.
- Foss v. Harbottle, 31, 122.
- Fox v. Mackreth, 154, 155.
- Fratt v. Fiske, 55.
- Freeland v. McCullough, 46.
- Freeman v. Hill, 245.
- Freeman v. McDaniel, 13.
- Fremont v. Merced Co., 634. MAN-DAMUS.
- Fremont v. Seals, 115.
- French v. Brewer, 637. OIL.
- Friedhoff v. Smith, 572.
- Frost v. Earnest, 482.
- Fuller v. Hodgdon, 13.
- Funk v. Haldeman, 234. 7 M. R. 203.
- Gale v. Gale, 14.
- Ganter v. Atkinson, 576. LEASE.
- Gardner v. Perkins, 408, 454, 479.
- Gargan v. School District, 664.
- Garr v. Gomez, 304.
- Garstin v. Asplin, 328.
- Garth v. Cotton, 485.
- Gates v. Kieff, 459.
- Gates v. Teague, 315, 320, 329, 331.
- Geiger v. Green, 637. SURFACE SUPPORT.
- Gere v. Clarke, 123.
- Gerhard v. Bates, 76.
- Getty v. Binsse, 123.
- Getty v. Devlin, 122. 7 M. R. 29.
- Gibbs v. Cannon, 187.
- Gifford v. Carvill, 55. 6 M. R. 558.
- Gilbert v. Henck, 185.
- Gilbert v. Showerman, 579.
- Gill v. Rice, 575.
- Gillan v. Hutchinson, 422. 2 M. R. 317.
- Gillett v. Treganza, 210. 7 M. R. 432.
- Gilpins v. Consequa, 650.
- Gilroy's Appeal, 483.
- Gloninger v. Franklin Co., 226, 236. LICENSE.
- Golden Gate Co. v. Superior Court, 263, 546, 634.
- Gold Hill Co. v. Ish, 637. PATENT.
- Good v. Martin, 664.
- Goodell v. Lassen, 579.
- Goodheart v. Raritan Co., 638.
- Goodson v. Richardson, 614, 620.
- Goodtitle v. Alker, 308.
- Gordon v. Butler, 84, 113, 155.
- Gowan v. Christie, 621, 623. LEASE.
- Gracie v. Palmer, 682.
- Grant v. Law, 56. 3 M. R. 80.
- Graves v. Waite, 155.
- Gray v. Dougherty, 459.
- Gray v. N. Y. & S. O. Co., 122.
- Great Luxembourg Ry. v. Magnay, 152.
- Green v. Palmer, 560.

- Greenville v. Seymour, 413.
 Grinnell v. Cook, 163.
 Grey v. Ohio R. R. Co., 580.
Grey v. Northumberland, 237, 261,
 278, 474. 7 M. R. 251.
Grubb v. Bayard, 206, 209, 221. LI-
 CENSE.
Grubb v. Guilford, 206, 209, 234. 5
 M. R. 163.
Grymes v. Sanders, 154. MISTAKE.
 Guerard v. Geddes, 372.
 Guille v. Swan, 601.
 Gunter v. Sanchez, 180.

 Hafod Co., *In re*, 155.
 Haigh v. Jagger, 474.
 Haight v. Lucia, 635, 636.
 Hale v. West Va. Oil Co., 153.
Hall v. Fisher, 155. PLEADING.
 Hallett v. Hallett, 122.
 Hamilton v. Ely, 637.
 Hammond v. Pennock, 122.
 Hanson v. Gardiner, 300, 321, 636.
 Hardy v. Hunt, 167.
 Harkinson's Appeal, 579.
Harlan v. Lehigh Coal Co., 208.
 LEASE.
Harris v. Tyson, 154. VENDOR
 AND P.
 Harrison v. Nixon, 276.
 Hart v. TenEyck, 347.
 Hart v. The Mayor, 277, 310, 499:
 Hartopp v. Hartopp, 64.
 Hartwell v. Root, 75.
 Harvey v. Harvey, 507.
 Harvey v. Ross, 297.
 Harvey v. Varney, 16.
 Hastings v. Wagner, 235.
 Hawkins v. Appleby, 75.
 Hawkins v. Campbell, 13.
 Hazleton v. Union Bank, 63, 67.
 Head v. Horn, 153.
 Heathcote v. North Co., 413.
 Hedley v. Bates, 620.
 Henderson v. Hay, 620.
Henry v. Ererts, 153. 5 M. R. 603.
Henshaw v. Clark, 305, 498. TRES-
 PASS.
 Hepburn v. Lordon, 523.

Hess v. Winder, 330, 499, 584.
 POSSESSION.
 Hicks v. Bell, 322.
 Hicks v. Compton, 419, 454.
 Hicks v. Michael, 309, 458, 498, 537.
 Hill v. Bush, 13.
 Hill v. Commissioners, 499.
 Hill v. Hobart, 43.
 Hill v. West, 234.
 Hiller v. Collins, 263, 335, 336, 419.
 Hillman v. Newington, 599.
 Hills v. Bannister, 649.
 Hilton v. Granville, 454.
 Hine v. Stephens, 498, 579.
 Hitchens v. Congreve, 30, 122.
 Hitner v. Suckley, 691.
 Hobbs v. Amador Co., 599, 638.
 Hoffman v. Bechtel, 185.
Hoffman Co. v. Cumberland Co., 153.
Hoffman v. Stone, 323. 4 M. R.
 520.
 Holbrook v. Connor, 83, 113, 154.
 Holdridge v. Webb, 76.
 Holmes v. Seeley, 278.
 Hoolbrook v. Burt, 43.
 Hornbeck v. Westbrook, 7.
 Horner v. Hanks, 122.
 Hotchkiss v. Thomson, 683.
 Houghton v. Ely, 180.
 Howard v. Hatch, 75.
 Howe v. Dartmouth, 191.
 Howe v. Huntingdon, 43.
 Hoy v. Grenoble, 654.
 Hoyt v. Carter, 425.
 Hubbard v. Briggs, 64, 76.
 Hubbell v. Meigs, 75, 76.
Huff v. McCauley, 207, 234. LI-
 CENSE.
Huff v. McDonald, 180. TEN.
 COM.
 Huguenin v. Basely, 64, 65.
 Humble v. Glover, 7.
 Humphreys v. Humphreys, 334.
 Hunt v. Johnson, 530.
 Hunter v. H. R. Iron Co., 30.
 Huntingford v. Mussly, 76.
 Hurst v. Hurst, 646.
 Huss v. Stephens, 8.
 Huston v. Fort Atkinson, 202.

- Ide v. Gray*, 13.
Irwin v. Covode, 249. WASTE.
Irwin v. Davidson, 251, 263. 7 M. R. 237.
Irwin v. Phillips, 323, 502. WASTE.
Isenburg v. East India Co., 615.

Jackman Will Case, 66.
Jackson v. Allen, 119. 7 M. R. 127.
Jackson v. Campbell, 75.
Jackson v. Cory, 7.
Jackson v. Gumaer, 530.
Jackson v. McMurray, 268.
Jackson v. Sisson, 7.
James v. Elliott, 154.
Jennings v. Broughton, 154. PROSPECTUS.
Jerome v. Ross, 276, 300, 637.
Jesus College v. Bloom, 380.
Johnson v. Fleet, 123.
Johnson v. Johnson, 575.
Johnson v. Randall, 310.
Johnson v. Wide West Co., 454.
Johnstown Iron Co. v. Cambria Co., 206, 208, 218, 234, 236. LICENSE.
Jones v. ———, 259, 260.
Jones v. Felch, 123.

Keeler v. Green, 637. QUARRY.
Keller v. Johnson, 13.
Kelley v. Sheldon, 63.
Kelly v. Donahoe, 202.
Kelsey v. Northern Light Co., 153. PLEADING.
Kensler v. Clark, 358.
Kenton v. Railway Co., 579.
Kershaw v. Thompson, 279.
Kidd v. Dennison, 498.
Kidd v. Laird, 450, 525. 4 M. R. 571.
Kimball v. Green, 310.
Kincheloe v. Holmes, 188.
Kinder v. Jones, 474.
Kingsley v. Wallis, 43.
Kinnerman v. Henry, 363.
Kinsler v. Clarke, 320, 339.
Kirkpatrick v. White, 185.
Knatchbull v. Fearnhead, 31.

Kramph v. Hatz, 185.
Kynaston v. East India Co., 696.

Lade v. Shepherd, 308.
Lady Bryan Co. v. Lady Bryan Co., 540, 628. 7 M. R. 478.
Laird v. Boyle, 638. PLEADING.
Lake Superior Co. v. Drexel, 74, 155.
Lance's App. 503.
Lane v. Newdigate, 503, 515, 521, 522, 614, 620.
Langdon v. Fogg, 74, 155.
Lathrop v. Pollard, 138.
Law v. Grant, 572. 7 M. R. 56.
Laurence's Appeal, 565. 7 M. R. 542.
Lawrence v. Knowles, 43.
Lawrence v. Trustees, etc., 123.
Lawrence v. Van Deventer, 122.
Lazard v. Wheeler, 457.
Leach v. Day, 458, 500.
Leach v. Leach, 14.
Lee v. Alston, 249.
Le Fevre v. Le Fevre, 219.
Lefler v. Field, 76.
Lemon v. Grosskopf, 16.
Leslie v. Wiley, 30, 122.
Leyman v. Abeel, 210, 221.
Life Ins. Co. v. Minch, 122.
Little Schuylkill Co. v. Richards, 601. NEGLIGENCE.
Livingston v. Harris, 123.
Livingston v. Livingston, 250, 276, 315, 321, 328, 530, 636.
Livingston v. Peru Co., 154.
Lloyd v. Passingham, 371, 383, 384.
Long v. Woodman, 113.
Lord Abinger v. Ashton, 615, 617, 621, 623. 6 M. R. 1.
Lord Barnard's case, 249.
Lord Courtown v. Ward, 614.
Lord Mountjoy's Case, 206, 209, 221, 222. LICENSE.
Lorenz v. Jacobs, 559, 638.
Loring v. Illsley, 450.
Lowndes v. Bettle, 466, 474, 475.
Low v. Connecticut R. R., 64.

- Lowther v. Stamper, 638.
Luckhart v. Ogden, 41. 2 M. R. 601.
Lumbard v. Aldrich, 689.
Lunsford v. La Motte Co., 539.
 LICENSE.
Lutz v. Linthicum, 649.
Lynch's App., 17.
Lynch v. Willard, 123.
Lyn v. Pierce, 278.
Lyon v. Jerome, 202.
Lyon v. Woodman, 469, 577. 7 M. R. 493.
Lysney v. Selby, 13.

Maden v. Veevers, 452, 636.
Mallow v. Hinde, 346.
Mammoth Co.'s Appeal, 560. 7 M. R. 460.
Marker v. Marker, 508.
Marquis of Lansdowne v. Marchioness of Lansdowne, 278.
Marsh v. Falker, 75.
Marsh v. Whitmore, 151.
Marshall v. Baltimore & O. R. R. 686.
Marston v. Simpson, 154. RESCUSSION.
Martin v. Browner, 422. 1 M. R. 613.
Mason v. Lord, 30, 31.
Mason v. Thompson, 163.
Massie v. Watts, 472.
Masson v. Boret, 31, 39, 43, 122, 123.
Mather v. Trinity Church, 278. TROVER.
Matteawan Co. v. Bentley, 31.
Matthews v. Bliss, 13.
Maule v. Ashmead, 482.
Maute v. Gross, 153. OIL.
Mayer v. Shoemaker, 32, 39.
Mayne v. Griswold, 122.
Mead v. Mali, 123.
Meeker v. Winthrop I. Co., 133.
Meghan v. Mills, 278.
Menard v. Hood, 637.
Merced M. Co. v. Fremont, 373, 418, 458, 502, 539, 623. 7 M. R. 309.

Mexborough v. Bower, 516, 637. 2 M. R. 92.
Meyer v. Amidon, 75.
Michigan Cent. R. R. v. Carrow, 168.
Millenovich, Estate of, 192.
Miller v. Craig, 102.
Miller v. Larson, 14.
Minor v. Mechanics Bank, 648.
Minturn v. F. L. & T. Co. 123.
Minturn v. Main, 31, 124.
Mitchell v. Dors, 255, 300, 400, 636. 7 M. R. 250.
Mitchell v. United States, 337.
Mogg v. Mogg, 321, 474.
Monkhouse v. Corp. of Bedford, 630.
Mooney v. Miller, 113.
Moore v. Burke, 76.
Moore v. Ferrell, 305, 309, 313, 336, 407, 516. 7 M. R. 281.
Moore v. Hylton, 542.
More v. Massini, 330, 539. 7 M. R. 455.
Morgan v. Bliss, 13.
Morgan v. Chamberlain, 14.
Morphett v. Jones, 277, 339.
Morris Co. v. Central R. R. Co., 579.
Morrison v. Dapman, 428.
Morton v. Scull, 64.
Morton v. Superior Court, 638.
Moseley v. Moseley, 14.
Munch v. Cockrell, 31.
Munson v. Tryon, 494, 577. 7 M. R. 469.
Murdock's Case, 515.
Murphy v. Campbell, 234.
Murray v. Knapp, 571.
McCabe v. Burns, 1, 2. 6 M. R. 665.
McCarty v. Patton, 645.
McClintock v. Bryden, 323. PUBLIC DOMAIN.
McCrea v. Purmort, 122.
McCreery v. Brown, 559.
McCurdy v. Noak, 637.
McDonald v. Bear Riv. Co., 450. 1 M. R. 639.
McDowell v. Lehigh Val. Co. 188.
McFarland v. Cultertson, 597.

- McGarrell v. Murphy, 559.
 McGau v. O'Neil, 57.
McGoon v. Ankeny, 455. 1 M. R. 9.
 McHenry v. McCall, 235.
 McKee v. Judd, 456, 457.
 McLanahan v. Insurance Co., 122.
 McMillen v. Brown, 195.
 McQueen v. Middletown Co., 688.
 McVickar v. Wolcott, 262.
- Nash v. Church, 438.
 Natoma Co. v. Clarkin, 458, 459, 511.
 Negley v. Lindsay, 43, 45, 154.
 Nellis v. Clark, 14.
Nelson v. O'Neal, 637. 4 M. R. 275.
 Nevada Co. v. Kidd, 438, 637.
New Boston Co. v. Pottsville Co., 478, 638. 5 M. R. 118.
 New Haven v. Sargent, 202.
 New Jersey Co. v. Franklin Co., 637.
 New Jersey R. R. Co. v. Long Branch Com'rs, 608.
 New York Ins. Co. v. Nat. Pro. Ins. Co., 32.
 New York Ins. Co. v. Roulet, 122.
 New York Printing Est. v. Fitch, 276.
 Nichols v. Jones, 528, 638.
 Nichols v. Michael, 31.
 Nicodemus v. Nicodemus, 571, 579.
Norris v. Tayloe, 127, 153. 1 M. R. 383.
 North v. Turner, 457.
 Northeastern Co. v. Crossland, 636.
 Northeast, J. R. v. C. R. Co., 515.
 Norway v. Rowe, 321, 340, 341, 454.
 Nuneaton Local B'd v. Gen'l Sewage Co., 620.
- Oberlander v. Speiss, 75.
 Occum Co. v. Sprague M. Co., 581.
 O'Donnel v. Seybert, 123.
Old Telegraph Co. v. Central Co., 532. 7 M. R. 555.
 Oliver v. Walsh, 456.
Ophir Co. v. Carpenter, 237. 4 M. R. 640.
- Orange County Bank v. Brown, 171.
Oregon Co. v. Trullenger, 542. 4 M. R. 247.
 Osborn v. U. S. Bank, 344, 356.
 Otis v. Raymond, 13.
Outram v. Morewood, 446. 5 M. R. 484.
 Overend, Gurney & Co., *In re*, 31.
 Overton v. Davisson, 299.
 Owen v. Ford, 579.
- Packet Co. v. Clough, 63.
Page v. Parker, 153. 6 M. R. 514.
 Paine v. Wilcox, 64.
 Park Bank v. Watson, 142.
Parker v. Parker, 637. RECEIVER.
 Parker v. Sears, 499.
 Parker v. Wood, 381.
 Parrott v. Palmer, 257, 637.
 Partenheimer v. Vanorder, 601.
Partridge v. McKinney, 330. 1 M. R. 185.
 Pasley v. English, 299.
Patterson v. Hitchcock, 41. 5 M. R. 542.
 Patterson v. Miller, 411.
 Patterson v. Supervisors, 559.
 Patton v. Goldsborough, 235.
 Payne v. Elliot, 155.
 Pearsoll v. Chapin, 45.
 Peckham v. North Parish, 688.
Pence v. Langdon, 154. RESCISSION.
 Penneman v. Munson, 122.
Penniman v. Winner, 154. 2 M. R. 448.
 Pennsylvania v. Wheeling Bridge Co., 349, 350.
 People v. Bell, 310.
 People v. Common Pleas, 310.
 People v. Gold Run Co., 638.
 People v. Judges of Washington, 310.
 People v. Morrill, 458.
 People v. Olds, 310.
 People v. Page, 180.
 People v. Sloper, 180.
 People v. Superior Court, 310.
 People v. Tioga C. P., 123.
 Perkins v. Collins, 263.

- Perkins v. Prout*, 153. 2 M. R. 139.
Perkins v. Savage, 14.
Perkins v. Sterrett, 155.
Perrine v. Striker, 123.
Perry v. Knott, 31.
Perry v. Parker, 353, 355, 383, 384.
Peter v. Wright, 122.
Peterson v. Speer, 9.
Pettibone v. La Crosse Co., 579.
Phalen v. Clark, 16.
Phillips v. Homfray, 155.
Pickering v. Stapler, 234.
Pigot v. Bullock, 249.
Pillsworth v. Hopton, 316, 353, 354, 355.
Pinkerton v. Woodward, 180.
Pioneer Co. v. Baker, 155.
Plant v. Stott, 508. 6 M. R. 175.
Player v. Roberts, 251.
Poor v. Carleton, 340, 358, 360, 363, 384, 524, 542.
Port v. Williams, 13.
Porter v. McClure, 123.
Post v. Pearsall, 234.
Pratt v. Brett, 614.
Preston v. Gressom's Distributees, 262.
Price v. Keyes, 123.
Pumpelly v. Green Bay Co., 578.
Purcell v. Nash, 255, 636.
Pusey v. Wright, 485.
Putnam v. Hubbell, 30, 32.

Ragan v. McCoy, 13.
Railroad Co. v. Boody, 122.
Rankin v. Huskisson, 515, 523.
Rawlins v. Wickham, 31.
Read v. Consequa, 691.
Real Del Monte Co. v. Pond Co., 257, 419, 460, 500. 7 M. R. 452.
Reddall v. Bryan, 499.
Reese Riv. Co., In re, 155.
Reid v. Gifford, 499, 500.
Renton v. Maryott, 154. MORTGAGE.
Rerick v. Kern, 219, 573.
Rex v. Barnard, 31, 122.
Reynolds v. Perkins, 507.
Rhodes v. Dunbar, 579.
Rice's Appeal, 153. 3 M. R. 638.

Richards' Appeal, 579.
Richards v. Schlegelmich, 172. 3 M. R. 78.
Richmond v. Smith, 163.
Richter v. Poppenhausen, 123.
Riddle v. Murphy, 235.
Ringgold v. Haven, 156, 157.
Ritger v. Parker, 234.
Robb v. Robb, 428.
Roberts v. Anderson, 340, 362, 369, 524.
Roberts v. Wilson, 584. 4 M. R. 498.
Robertson v. Smith, 564. 7 M. R. 196.
Robinson v. Campbell, 349.
Robinson v. Howard, 450.
Robinson v. Lord Byron, 474, 515, 522.
Robinson v. Smith, 31, 122. 3 M. R. 443.
Rochdale Canal Co. v. King, 614.
Rogers v. Cooney, 589. TAILINGS.
Rogers v. Linton, 507.
Rogers v. Tennant, 559.
Rolleston v. New, 620. LEASE.
Rollins v. Wickham, 122.
Ross v. Dysart, 482.
Ross v. Estates Inv. Co., 31.
Ross v. Mather, 123.
Rowe v. Portsmouth, 578.
Rowe v. Osborne, 43.
Russell v. Elliott, 310.
Rutler v. Smith, 425.
Rynd v. Rynd Oil Co., 203. 5 M. R. 275.

Sage v. Sherman, 75, 123.
Salter v. Ham, 123.
Sanborn v. Belden, 558.
Sandford v. Handy, 13.
San Francisco v. Calderwood, 200.
San Mateo W. Wks. v. Sharpstein, 558.
Saratoga & S. R. R. Co. v. Row, 32, 124.
Saunders v. Hatterman, 13.
Sayer v. Pierce, 263. 1 M. R. 72.
Scheetz' Appeal, 466.
Schenck v. Conover, 629.
Schlects' Appeal, 563.

- Scholfield v. Templer, 65.
Scott v. Kittanning Co., 29. 3 M. R. 159.
Scott v. Depeyster, 75.
Scott v. Wharton, 277.
Sea Insurance Co. v. Ward, 310.
Senior v. Pawson, 615.
Seymour v. Wilson, 32, 122.
Sharp v. New York, 64.
Shaw v. McGregor, 428.
Shaw v. Stenton, 480. LEASE.
Shelton v. Tiffin, 334.
Shepard v. Sandford, 123.
Shields v. Barrow, 506, 508, 518.
Shoemaker v. Keely, 123.
Short v. Stevenson, 29. 6 M. R. 629.
Shotwell v. Mali, 75.
Simar v. Canaday, 122.
Simons v. Vulcan Co., 9, 144. 6 M. R. 623.
Simonton v. Winter, 648.
Slaughterhouse Cases, 309.
Sloan v. Lawrence Furnace, 528. 5 M. R. 659.
Smith v. City of Rome, 202. 7 M. R. 306.
Smith v. Collyer, 320, 474.
Smith v. Hibernian M. Co., 345, 507.
Smith v. Lowry, 261.
Smith v. Mariner, 63.
Smith v. Morris, 621. LEASE.
Smith v. Pettingill, 300.
Smith v. Richards, 55, 75, 153.
Sobey v. Thomas, 573. 4 M. R. 359.
Soles v. Hickman, 7.
Sortore v. Scott, 122.
Soule v. Daws, 450.
Southcote's Case, 221.
Sparhawk v. Union Pas. Ry., 580.
Sparrow v. Strong, 313. 2 M. R. 320.
Speed v. Hann, 172.
Spencer v. Bir. R. Co., 515.
Spencer v. Wilson, 262.
Sprague v. Tripp, 202.
Squier v. Gale, 310.
Stainniger v. Andrews, 589, 596.
Stark v. Fuller, 185.
State v. Judge, 579.
Steamboat Co. v. Livingston, 499.
Stearns v. Barrett, 645.
Steele v. Kinkle, 63.
Stephens v. Huss, 8.
Stevens v. Beekman, 261, 276, 300.
Stevens v. So. Devon Ry. Co., 416.
Stevens v. Williams, 237, 532. 1 M. R. 559.
Stevenson v. Westfall, 132.
Stoakes v. Barrett, 323.
Stockbridge Co. v. Cone Iron Works, 667. 6 M. R. 317.
Stokely v. Robbstown Co., 202.
Stonecifer v. Yellow Jacket Co., 154. 3 M. R. 4.
Storer v. Gt. Western Ry. Co., 620.
Storm v. Mann, 353, 355, 499, 536.
Story v. Lord Windsor, 278.
Strong v. Peters, 13.
Swan v. Timmons, 666.
Swartz v. Swartz, 234.
Swartz v. Gillett, 14.
Sweet v. Bradley, 75.
Swift v. Sheppard, 418, 628.
Tallman v. McCarty, 683.
Tartar v. Spring Creek Co., 323. TIMBER.
Taylor v. Burnsides, 299.
Taylor v. Dougherty, 235.
Taylor v. Holter, 180. 3 M. R. 322.
Taylor v. Luther, 338.
Taylor v. Salmon, 507.
Terrell v. Ingersoll, 666.
Thomas v. Hopper, 166.
Thomas v. Jones, 253.
Thomas v. Oakley, 300, 317, 474, 530, 539. 7 M. R. 254.
Thomas v. Railroad Co., 153.
Thomas Co. v. Allentown Co., 638. INSPECTION.
Thompson v. Matthews, 485.
Thompson v. Salmon, 13.
Thompson v. Topham, 507.
Thorn v. Sweeney, 305, 546, 583, 586, 588. 7 M. R. 564.

- Thornburgh v. Savage Co.*, 638. 7 M. R. 667.
Tiley v. Moyers, 480. 4 M. R. 320.
Tipping v. Eckersley, 614.
Titcomb v. Kirk, 196. 5 M. R. 10.
Tobin v. Walkinshaw, 340, 341, 345, 346, 370.
Townsend v. Bogart, 75.
Tradesman's Bank v. Merritt, 122.
Travis v. Tait, 166.
Trenchard v. Wanley, 63.
Troup v. Haight, 530.
Tuolumne County v. Chapman, 330. NUISANCE.
Tuolumne County v. Stanislaus County, 310.
Tyler v. Williamson, 208.

Udell v. Atherton, 64.
Union Bank v. Mott, 123.
Union Co. v. Bliven Co., 236. 3 M. R. 107.
United R. R. v. Standard Co., 604.
United States v. Gear, 358, 373. TRESPASS.
United States v. Montgomery, 180.
United States v. Parrott, 330, 407, 452, 478, 503, 516, 524, 667. 7 M. R. 335.

Van Alen v. American Bank, 122.
Vane v. Lord Barnard, 248.
Vangelin v. Goe, 564.
Van Rensselaer v. Radcliff, 210.
Vansickle v. Haines, 114. WALTER.
Van Walkenbargh v. Rahway Bk., 630, 633.
Vanzandt v. Argentine Co., 309. 7 M. R. 634.
Varney v. Pope, 580.
Vermont Co. v. Windham Bank, 1. 3 M. R. 312.
Vernon v. Keys, 107.
Vernalen v. Older, 638. MORTGAGE.
Vigers v. Pike, 153, 154.
Vinal v. West Va. Co., 638.
Voorhees v. Earl, 31.

Voorhis v. Childs, 123.

Wakeman v. Dalley, 46, 75, 76.
Walburn v. Ingilby, 632.
Waldron v. Marsh, 454, 499, 567. 7 M. R. 305.
Walford v. Walford, 630.
Walker v. Fletcher, 696. 8 M. R. 1.
Walker v. Hough, 110.
Walker v. Tiffin Co., 291. MORTGAGE.
Walker v. Tucker, 480. LEASE.
Waltham v. Broughton, 63.
Walworth v. Holt, 507.
Wann v. McGoon, 153.
Ward v. Eyre, 614.
Ward v. Seabry, 691.
Ward v. Van Bokkelen, 524.
Ware v. Grand Junction Co., 416.
Waring v. Cram, 180. PROSPECTING CONTRACT.
Washington University v. Green, 515.
Wason v. Sanborn, 571, 579, 586.
Watkins v. Cousall, 14.
Watson v. Hunter, 379, 485.
Weed v. Page, 43.
Weigel v. Walsh, 571.
Welch v. Sackett, 13.
Wendt v. Ross, 180.
West v. Pine, 235.
West v. Randall, 519.
Western Co. v. Virginia Co., 638.
Western Union Tel. Co. v. West & At. R. R., 469.
West Point Co. v. Reymert, 532. 7 M. R. 528.
West Va. Co. v. Vinal, 638.
Wheatley v. Westminster Coal Co., 615, 621. LEASE.
Wheaton v. Baker, 31.
Whelan v. Whelan, 64.
Whipley v. Dewey, 428.
White v. Booth, 499.
Whitman Co. v. Baker, 511.
Whitmore v. Thornton, 259, 262.
Whittlesy v. Hartford R. R., 498.
Wichersham v. Orr, 573.
Widner v. Walsh, 547.

- | | |
|---|--|
| <p> <i>Wilcox v. Jackson</i>, 280.
 <i>Wilkinson v. Stafford</i>, 192. TRUST.
 <i>Williams v. Kinder</i>, 304.
 <i>Williams v. Pomeroy Co.</i>, 455. 6
 M. R. 195.
 <i>Williams v. Whingates</i>, 507.
 <i>Wilson v. Fuller</i>, 64.
 <i>Wilson v. McKreth</i>, 208.
 <i>Winnipiseogee Lake Co. v. Worster</i>,
 500.
 <i>Winship v. Pitts</i>, 379.
 <i>Wolfskill v. Malajowich</i>, 593.
 <i>Wood v. Ledbitter</i>, 219.
 <i>Wood v. Perry</i>, 123. </p> | <p> <i>Wood v. Sutcliffe</i>, 569.
 <i>Woodbury v. De Lap</i>, 155. PLEAD
 ING.
 <i>Wooding v. Malone</i>, 571.
 <i>Woodruff v. N. Bloomfield Co.</i>, 41
 429, 599, 638.
 <i>Woods v. Sherman</i>, 181.
 <i>Woodward v. Worcester</i>, 578.

 <i>Yancy v. Downer</i>, 276.

 <i>Zabriskie v. Smith</i>, 123.
 <i>Zachary v. Curtis</i>, 411. </p> |
|---|--|

TABLE OF HEADINGS.

	PAGE.
FRAUD, (continued.).....	1
GOLD DUST.....	156
GUARANTY.....	181
GUARDIAN AND WARD.....	189
HIGHWAYS.....	193
INCORPOREAL HEREDITAMENTS.....	203
INJUNCTION.....	237
INJUNCTION BOND.....	639
INSPECTION.....	667

MINING REPORTS.

VOL. VII.

¹ BURNS ET AL. V. McCABE.

(72 Pennsylvania State, 303. Supreme Court, 1872.)

Deed to associates in corporate name—Rescission. Burns contracted for the purchase of a piece of oil land and sold an interest or share in the adventure to plaintiff. Afterward he had a deed executed to "The Middletown Oil Company," no such company having been incorporated. Plaintiff sued to recover the money advanced for his share, on the ground of misrepresentation. *Held*, that the deed to the Middletown Oil Company passed no title for want of a proper grantee, and that therefore no tender of deed of his interest from plaintiff was necessary to perfect a rescission.

Rescission effects an estoppel. Plaintiff's only interest in the land could be by virtue of his membership of the company. If his membership in the company was repudiated by a rescission of the contract he would be estopped to claim as a member of the company.

Tender of deed into court. Making and filing with the clerk, of a deed of release, after suit brought, allowed in this case.

Admissions of conspirators. The acts and declarations of one of several parties acting in concert in an illegal transaction for their joint benefit, are the acts and declarations of all.

Several action. Other persons purchased stock at the same time as the plaintiff and under like circumstances. *Held*, the several contract of each, and that upon rescission the defrauded party alone was entitled to recover.

November 11, 1872. Before THOMPSON, C. J., READ, AG-NEW, SHARSWOOD and WILLIAMS, JJ.

Error to the District Court of Allegheny County, No. 46, to October and November Term, 1872.

This was an action of assumpsit brought to August term, 1867, by William P. McCabe against John Burns and Samuel Stevenson.

¹ *McCabe v. Burns*, 6 M. R. 665.

² *Vermont Co. v. Windham Bank*, 3 M. R. 312.

The declaration was that the defendants represented to the plaintiff that they had entered into an agreement with Daniel Smith to purchase from him a piece of oil land of eight acres, in Columbiana county, Ohio, for \$26,000, and that they desired to form a company to pay for said land and complete said purchase, the terms of which were one half cash and one half in seven months; that on these representations the plaintiff agreed to become a purchaser with the defendants and others, of the said land, and to take one share of \$500 in the company so formed, one half to be paid in cash and the other half in seven months; in pursuance of this agreement the plaintiff paid the defendants \$250 and gave his note for \$250 payable in seven months. The plaintiff averred that the representations were untrue; that the land was not good oil territory, was not situated in the place represented, and that defendants had not agreed to pay Smith \$26,000 but only the sum of \$4,000, and therefore an action had accrued to the plaintiff to have from the defendants the said sum of \$250.

The case has been before tried and the judgment reversed in the Supreme Court. It is reported as *McCabe v. Burns*, 16 P. F. Smith, 356.

On the trial of the case, November 20, 1871, before KIRKPATRICK, J., the plaintiff gave evidence by Alfred McCabe, that about the 17th of January, 1866, there was a meeting at a school house of certain persons of Moon township, at which Burns, one of the defendants was present. The plaintiff also was present and a number of other persons. Burns represented that he and Stevenson had a piece of property at Smith's Ferry bought from Daniel Smith. He said it lay on Little Beaver Creek, "opposite the tree derrick." He said they were to pay \$26,000 for it, \$3,200 per acre. They had got it for their neighbors and were getting up a company, and did not want any one in but their friends, and they gave it at the cash price of the property. The plaintiff then agreed to subscribe. There was a meeting on the 27th of January at the school house for the purpose of getting up the Middletown Oil Company. Both Burns and Stevenson were present. The \$250 was then paid. A committee was appointed to examine the property. It was not located where it had been represented, and was not on the creek. Burns afterward said

they had given but \$16,000 for the property. There were to be fifty-two shares.

Richard Gracey testified that Burns said the land had been sold to the Middletown Oil Company.

W. P. McCabe, plaintiff, testified that he subscribed for a share of stock in the Middletown Oil Company, and paid \$250 at Middletown, at the school house, and gave a note for \$250. The money was paid to Burns, who handed it to Stevenson; he delivered the receipt to plaintiff; the receipt was:

“MOON TOWNSHIP, Jan. 27, 1866.

“Received of W. P. McCabe, two hundred and fifty dollars, the first installment, one share, on the oil lands purchased by John Burns and Samuel Stevenson, located in St. Clair township, Columbiana county, State of Ohio, on the Little Beaver Creek, Smith's Ferry.

\$250.00.

JOHN BURNS,
SAMUEL STEVENSON.”

Much evidence was given on the question of misrepresentation by the defendants.

The plaintiff proposed to file a quitclaim deed to defendants of any interest he might have in the lands of the Middletown Oil Company, and the deed was filed by leave of the court, under objection and exception by the defendants.

There was in evidence a deed dated March 1, 1866, from Daniel Smith to the “Middletown Oil Company, their heirs and assigns,” for the land in question, the company having never been incorporated, nor having any articles of association.

There was evidence that the plaintiff gave notice to Burns that he rescinded the contract and had demanded from Burns the repayment of the money. This was before bringing the suit.

The defendants gave evidence that at the meeting at the school house January 27, 1866, the persons who had before subscribed for stock, organized a company and elected a president, treasurer and secretary, and a manager.

There was evidence also in answer to the plaintiff's evidence as to misrepresentation, and generally to the plaintiff's case.

There were exceptions to admission of evidence offered by the plaintiff not necessary to notice.

The following are plaintiff's points, with their answers:

1. The conveyance in evidence from Daniel Smith to Middletown Oil Company, date March 1, 1866, passed no title for the land described therein from Daniel Smith, if the jury find from the evidence that the said company never was incorporated.

Answer: "The first point is affirmed. The land purchased by the defendants was conveyed to the 'Middletown Oil Company,' and if the jury find that this Middletown Oil Company was not incorporated, no estate passed by the conveyance, and the legal title still remains in the grantor."

2. If the jury believe from the evidence that the Middletown Oil Company never has been incorporated, then no title to the land described in said deed, in evidence of March 1, 1866, passed by said deed to the plaintiff.

3. If the jury believe from the evidence that it was a share of stock in a company to be formed and incorporated, for which plaintiff subscribed, then no title passed to said plaintiff by the deed in evidence.

Both these points were affirmed.

5. If the jury believe from the evidence that Samuel Stevenson and John Burns joined in the purchase from Smith and jointly received the money paid by plaintiff and others, and jointly applied it to the payment on the land to Smith and acted jointly in getting up the company, then all the acts and declarations of John Burns, made when soliciting the subscription from plaintiff, are as binding upon the other defendant, Samuel Stevenson, as if he had been present assenting thereto.

Answer: "The fifth point is affirmed. Under the state of facts suggested in and by this point the acts of any one of these defendants are the acts of the other, and so binding upon both."

8. If the plaintiff was induced by fraudulent representations of defendants, or either of them, to enter into the arrangement and pay his money, and no title has ever passed to plaintiff, then he is entitled to recover back his money.

Answer: "The sixth point is affirmed, only, however; and if you further find that the plaintiff was prejudiced and in-

jured by these fraudulent representations, and further, that as soon as he discovered fraud or deception, or lie, as you may choose to call it, or within a reasonable time thereafter, he discovered and disapproved the contract, and gave the defendants to understand, and how by words, or act, or both, that he would not be bound by it, in a word, that he did not play 'fast and loose,' waiting to see whether his venture was a success or a failure, and promptly upon discovering the wrong that had been put upon him, rescinded the contract and notified the defendants that he would not stand to or be bound by it, if, and unless you find these additional facts, the point is refused."

The following are points of defendants, and their answers:

4. If you believe that the plaintiff, McCabe, and others associated with him as the Middletown Oil Company, with the knowledge that they had not been incorporated, accepted the deed of land from Smith, made to the "Middletown Oil Company, their heirs and assigns," and with that knowledge on the part of McCabe, and with his assent, the said associates, the plaintiff included, continued to exercise ownership over, or to bore for oil on said land, and proceeded to stock out a portion thereof to other parties and to sell stock therefor, or used the money derived from such stocking out in boring on the Smith land, the plaintiff had such an interest in the land as made it his duty to tender to defendants a reconveyance or release of his interest in or right thereto before he could bring this action; and not having done so, your verdict must be for the defendants.

Answer: "If the plaintiff took no legal title or estate by the deed of Smith and wife to the Middletown Oil Company, neither one nor all of the acts suggested or enumerated in this point could or would give him such title or estate to this land as would render a reconveyance or transfer by him to the defendants necessary, before his right to this action could accrue. Provided he had it on other and substantial grounds—in other words, if his right of action was complete without this reconveyance, the fact that he did not first reconvey under the facts stated in this point would be no legal bar to his right to recover in this action."

6. If you believe from the evidence that the plaintiff and

others associated themselves together as the Middletown Oil Company for the purpose of purchasing land and boring for oil, and that the defendants were the agents of the said company in the purchase of land from Smith, then any fraud or deception that may have been practiced in such premises would be a fraud on the company, and not on the plaintiff alone, and all the members of the company should have been joined as plaintiff in this action; and that this not having been done, the plaintiff can not recover here, and your verdict must be for the defendants.

Answer: "The sixth point is refused."

The verdict was for the plaintiff for \$337.50.

The defendants removed the record to the Supreme Court and assigned for error the answers to the points of the parties, and the admission of plaintiff's offers of evidence.

J. H. BAILEY and T. M. MARSHALL, for plaintiff in error.

J. BARTON and R. WOODS, for defendants in error.

The opinion of the court was delivered January 6, 1873, by WILLIAMS, J.

The plaintiff below subscribed for a share in the oil lands purchased by the defendants, "located in St. Clair township, Columbiana county, State of Ohio, on the Little Beaver Creek, Smith's Ferry," and paid them one half of the price in money and gave his note payable at a future day for the residue. He refused to pay the note after it became due, and upon the defendant's refusal to refund the money which he had paid, brought this action to recover it back on the ground that they had been guilty of such fraud as justified him in rescinding the contract.

Under the instructions of the court the jury found that the plaintiff was induced to enter into the contract by the false and fraudulent representations of the defendants as to the location, value and consideration paid for the land, and that upon discovering the fraud, he rescinded the contract and gave them notice that he would not be bound by it; and in accordance with this finding they returned a verdict in his

favor for the amount paid the defendants. It was insisted on the trial that the plaintiff was not entitled to recover, because he did not make or tender a reconveyance of his interest in the land to the defendants before bringing the action. But the court below being of the opinion that the plaintiff had no title to the land, instructed the jury in substance that he was not bound to make or tender a reconveyance. Whether, if the plaintiff had such title, he was bound to tender a reconveyance of it or not, is the main question presented by the assignments of error. It is clear that no title to the land vested in the plaintiff, under the written contract between the parties. It does not purport to convey a definite interest in the land; it does not designate the price or quantity, nor does it describe its location with sufficient certainty. Both the consideration and subject of the contract are undefined. Where either is left uncertain, the contract is legally incomplete, and therefore void: *Soles v. Hickman*, 8 Harris, 180. If, then, no title passed to the plaintiff under the contract, had he any such interest in the land under the deed of Daniel Smith to the Middletown Oil Company as made it necessary for him to tender a reconveyance before commencing the action? The defendants purchased the land from Smith, and at their request he conveyed it by deed, duly acknowledged, to "The Middletown Oil Company of Allegheny County and State of Pennsylvania, their heirs and assigns." The company never had any articles of association or charter of incorporation. It was composed, as the evidence shows, of the defendants and those to whom they sold shares or interests in the land. The learned judge instructed the jury that if the company was not incorporated, no title passed to the plaintiff by the deed. This instruction was in conformity with the opinion of this court when the case was here on a former writ of error (*McCabe v. Burns*, 16 P. F. Smith, 356), and is supported by the following authorities: *Jackson v. Sisson*, 2 Johns. Cases, 321; *Jackson v. Cory*, 8 Johns. 385; *Hornbeck v. Westbrook*, 9 Id. 73; *Humble v. Glover*, Cro. Eliz. 328; Tho. Co. Litt. 316, 3 a, among others which might be cited. In delivering the opinion in *Jackson v. Sisson*, KENT, J., said: "There was no legal estate created by the patent, but what vested in the three patentees named. The description of the as-

sociation by the words, 'a settlement of friends on the west side of the Seneca lake' was too vague and uncertain to constitute a competent grantee at law or a *cestui que use* whose estate the statute would transfer into possession: Saunders on Uses, 63, 128. This would be like a grant to the parishioners, or inhabitants of a dale, or to the commoners of such a waste, or to the churchwardens of a parish, which are held to be void grants: Shep. Touch. 235-236." It is not easy to discover any real difference or distinction in principle between that case and the present. But even if the deed to the Middletown Oil Company is sufficient to vest the title in the members of the company as tenants in common on the principle, *id certum quod certum reddi potest* (*Huss v. Stephens*, 1 P. F. Smith, 282, *Stephens v. Huss*, 4 Id. 20), the question recurs whether the plaintiff had such title under the deed as he was bound to release or convey.

A reconveyance or return of the property is only required in order to prevent the party from holding the thing paid for, and recovering the price: *Babcock v. Case*, 11 P. F. Smith, 427. The deed on its face conveys no title or interest whatever to the plaintiff. If he is not a member of the company he has no title under the deed. Whether he is a member of the company or not, depends upon the validity of his contract with the defendants. If it was invalid by reason of fraud, and has been rescinded, then all his rights under it, including his rights as a member of the company, fell with its rescission. He has no title or claim to membership independently of his contract, and he has no title to the land independent of his membership. Having rescinded the contract on which his membership depended, how can he have or claim any rights incident to such membership? It is not pretended that he is or that he ever has been in the actual possession of the land, or that he has received any of its rents and profits.

If, then, the contract was fraudulent and void, and the plaintiff has rescinded it, as the jury have found, he has, as it seems to us, no more title to the land conveyed to the company than if the contract had never been made. He is estopped by its rescission and by the recovery of the money from asserting any title or claim to the land. Of what avail to the defendants then, would it be if the plaintiff had executed to them a conveyance or release before bringing the

action? If the deed vests in the defendants and their vendees as members of the company a valid title to the land, the defendants have a good title to all the estate therein, except the shares or interest held by their vendees. A conveyance from the plaintiff, therefore, would not enlarge their interests or make their title more secure. But if the plaintiff has some shadow of title or possible interest, it seems to us that under the circumstances of this case the deed of release and quitclaim, which he filed in court for the use of the defendants, is sufficient to entitle him to recover. In support of this view we need only refer to the opinion of THOMPSON, C. J. in *Babcock v. Case*, *supra*, in which he says: "If equity requires a reconveyance to precede suit, it will be so administered; if it can be protected on the trial, as it may in almost every possible case, it will be so administered. If there be no equity in the case, but only an assumption of it, it ought to be disregarded." Whatever equity the defendants in this case may have had, we think that it was fully protected by the deed filed for their use on the trial. If they had asked for a reconveyance when the plaintiff demanded his money, doubtless it would have been executed. As it is they have suffered no loss by the delay. It follows from what we have said, that there was no substantial error in affirming the plaintiff's first, second and third points, and refusing the defendant's fourth point.

Nor was there error in affirming the plaintiff's fifth and sixth points. It is well settled that where parties to an illegal transaction are shown to have acted in concert for their joint benefit, that the acts and declarations of one are to be regarded as the acts and declarations of all: *Peterson v. Speer*, 5 Casey, 478. This is the principle underlying both points, and they were rightly affirmed: *Simons v. Vulcan Oil and Mining Company*, 11 P. F. Smith, 202.

There was no evidence upon which to base the defendants' sixth point, and it was properly refused. The other subscribers were not parties to the contract which the plaintiff made with the defendants. It was his individual contract, and upon its rescission he alone was entitled to recover back the money he had paid on the footing of it.

There is nothing in the other assignments that requires dis-

cussion. The evidence contained in the bills of exception was properly admitted, and the plaintiffs in error have no reason to complain of the instructions or of the manner in which the case was submitted to the jury.

Judgment affirmed.

HARDY V. STONEBRAKER.

(31 Wisconsin, 640. Supreme Court, 1872.)

Fraud of agent against stranger of no avail to principal. Where a contract is valid in its inception, subsequent fraudulent conduct of one of the contracting parties toward a stranger, involving the same subject-matter, does not avoid the contract, especially when the stranger is not seeking relief.

Facts of the case—Agent to consummate fraud, allowed his hire. A agreed with B to let him have \$3,000 if he, B, would procure a purchaser of A's lead land at \$8,000. He procured a purchaser at this price by fraudulently concealing the fact that he was A's agent, and fraudulently advising the purchaser, as a friend, that the land was worth \$8,000 and could not be bought for less, which was not the truth. But the purchaser sought no relief. *Held*, that the original contract, although the commission was large, was not void, and that B could make no use of the fraud of his agent in procuring a purchaser, as a defense to his agreement, to pay the \$3,000 commission.

Appeal from the Circuit Court for Iowa County.

The plaintiff appealed from a judgment rendered in favor of the defendant, in pursuance of the verdict of a jury. The following statement of the case was originally prepared by Mr. Justice COLE as a part of his opinion herein:

"This action is brought to recover the sum of \$1,416, alleged to have been received by the defendant for the use of the plaintiff, or which the defendant owed the plaintiff. The material facts out of which the cause of action arose, or at least so many of them as it is necessary to state in order to understand our remarks upon the instruction given to the jury by the court, and to which exception was taken by the plaintiff, may be briefly stated as follows:

"The defendant was the owner of eighty acres of land in La Fayette county, which was supposed to be especially valuable for the lead mineral which it was thought to contain. In October, 1866, the defendant entered into a written contract with the plaintiff and his father, Joseph A. Hardy, and Dr. G. W. Lee, to lease and sell them the mineral right in this land and the right to mine upon it, for the sum of \$2,000; \$500 of which was paid down to the defendant, \$500 to be paid in one year, and \$1,000 in two years from the date of the contract, without interest. The second party to the contract failed to make the second payment, and the contract was abandoned, except that there was an understanding that if the defendant or the other party to the contract could sell the land for a sufficient price, the \$500 paid upon the contract was to be refunded. It appears that an arrangement was afterward entered into between the parties to this suit, by which the plaintiff undertook to find a purchaser for this property at the sum of \$8,000, and the defendant agreed, in consideration thereof, to pay him all above \$5,000 as a compensation for his services in making the sale at that price, and also in this way to repay the \$500 which the plaintiff and his co-lessees had paid on the contract which had been forfeited. In other words, the plaintiff was to have all the purchase money above \$5,000.

"This arrangement was made without reference to any particular purchaser. In May, 1868, the plaintiff induced one Capt. John Grant to purchase this property. He informed Grant that the defendant's price was \$8,000, and that the land was of great value for its mineral and finally succeeded in selling the property at this sum. The evidence is conflicting whether Grant purchased in the first instance the entire property for himself, and afterward sold a one fourth to the plaintiff, or whether the plaintiff was interested with Grant in the purchase to the extent of a one fourth interest from the outset. Previous to the purchase, however, the plaintiff saw the defendant, and told him Grant would buy the property at \$8,000 if the terms of payment would suit, and probably he requested the defendant in the negotiations to insist upon \$8,000 as the lowest sum he was willing to take. When the contract was reduced to writing, both the plaintiff and Grant were inter-

ested in the purchase in the proportion of three fourths to Grant and one fourth to the plaintiff, but whatever moneys were paid by the plaintiff were immediately paid back to him by the defendant. This was all kept from the knowledge of Grant, who doubtless supposed that the plaintiff was acting in the utmost good faith and was paying \$2,000 for his interest. Grant afterward purchased the interest of the plaintiff, paid for the property and took a deed. It is not denied that the defendant has received \$8,000 for the property; nor is it denied that he originally agreed to pay the plaintiff \$3,000 if he would find a purchaser at that sum. But the defendant now denies his liability to perform this agreement, on account of the alleged fraud practiced by himself and the plaintiff upon Grant. He claims that the plaintiff is seeking to enforce a contract which was a part of a dishonest, corrupt and fraudulent scheme to induce Grant to pay \$8,000 for property which the defendant was willing to sell for \$5,000, and therefore that the plaintiff is not entitled to recover any part of the money which was obtained by their joint fraudulent conduct.

"On the trial, among other things, the court below instructed the jury that if they should find that through the joint fraudulent representations and conduct of the plaintiff and defendant, Capt. Grant was induced to pay for the land the sum of \$8,000, and that the defendant—the plaintiff knowing it—would have been willing to take the sum of \$5,000, or thereabouts, as a fair price for the lands, and pay thereon all claims he admitted against the land, the plaintiff could not recover in this action any part of the money obtained from Capt. Grant through such dishonest and fraudulent transaction.

"This charge was excepted to by the plaintiff, and its correctness and applicability to the facts of the case are the principal questions we have to consider on this appeal."

WM. E. CARTER, for appellant, argued that the maxim "*In pari delicto potior est conditio defendentis*," does not apply to this case; that, to make it applicable, the contract between plaintiff and defendant, or their conduct, must have been immoral or illegal—must have worked injury to Grant, and been an intentional fraud upon him, such fraud being the

work not of the plaintiff alone, but of both these parties: Broom's Leg. Max., 702; 1 Story's Eq., §§ 203, 298, *et seq.*; 2 Parsons on Con., 769-772, 782; that there was no act done by both these parties to induce Grant to buy, unless it be alleged that they both agreed in misrepresentations relative to the price of the land, or the sum which defendant was willing to take for it; and that misstatements relative to the price which the seller will take for property, made during the course of the negotiations for a sale, do not constitute fraud: 1 Story's Eq., §§ 197-201; *Dupont v. Payton*, 2 E. D. Smith, 424; *Sandford v. Handy*, 23 Wend. 260; *Saunders v. Hatterman*, 2 Ired. 32; *Hawkins v. Campbell*, 1 Eng. 513; *Dugan v. Cureton*, 1 Ark. 41; *Lysney v. Selby*, 2 Ld. Ray. 1118; *Strong v. Peters*, 2 Root, 93; *Hill v. Bush*, 19 Ark. 522; *Fields v. Rouse*, 3 Jones' Law, 72; *Port v. Williams*, 6 Ind. 219; *Foley v. Cowgill*, 5 Blackf. 18; *Cronk v. Cole*, 10 Ind. 485; 2 Kent's Com., 485, 486. 2. He contended that the evidence showed the lands to be worth the full price paid by Grant, and the latter, therefore, was not injured by the transaction; and there can be no fraud where no one is injured: 2 Parsons on Con., 771, 772; 1 Story's Eq., § 203; *Ableman v. Roth*, 12 Wis. 90; *Castleman v. Griffin*, 13 Id. 538; *Barber v. Kilbourn*, 16 Id. 489; *Freeman v. McDaniel*, 23 Ga. 354; *Fuller v. Hodgdon*, 25 Me. 243; *Keller v. Johnson*, 11 Ind. 337; *Morgan v. Bliss*, 2 Mass. 111; *Otis v. Raymond*, 3 Conn. 413; *Ida v. Gray*, 11 Vt. 615. 3. The relation between Grant and the plaintiff was not that of partners, but merely that of tenants in common of the land after its purchase (3 Black. Com., 191; *Welch v. Sackett*, 12 Wis. 253), and plaintiff was under no obligation to disclose to his cotenant the terms upon which he obtained his own one fourth interest, or give him the benefit of the arrangement: *Matthews v. Bliss*, 22 Pick. 48; *Thompson v. Salmon*, 18 Cal. 632; *Ragan v. McCoy*, 29 Mo. 356. Nor was plaintiff the agent of Grant. But even if his relations to Grant were such that the latter was entitled to the benefit of any bargain he might make with the defendant, that is a matter with which defendant has no concern whatever.

P. A. ORTON and M. M. COTHREN, for respondent, contend-

ed that the case falls within the maxim "*Ex turpi contractu non oritur actio*," that while no compensation, however great, paid by defendant to plaintiff for making sale of the land to Grant, would of itself have been a fraud upon the latter, since in that case Grant would have treated with plaintiff as defendant's agent, and bought with his eyes open. The important fact here is, that plaintiff, while agent for the seller, formed a confidential relation with the buyer; that whether the plaintiff and Grant became partners or not, it is certain that when they agreed to buy this land as tenants in common, each was bound to good faith with the other in negotiating for the purchase, and neither could secure an advantage by the purchase which the other was not entitled to share; that each acted, in making the purchase, for himself and as agent for the other, and any advantage secured by one, like a bonus from the seller for making the purchase, was a gross fraud upon his co-purchaser, for which the latter could maintain an action at law, or, by suit in equity, compel the fraudulent purchaser to hold such advantage in trust for him: Collyer on Part., §§ 170-180; *Leach v. Leach*, 18 Pick. 76; *Anderson v. Lemon*, 8 N. Y. 236; *Brown v. Lynch*, 1 Paige, 147. Besides, the plaintiff and defendant combined to defraud Grant in the sale of the land; and the sale was effected by absolutely false and fraudulent representations made by both of them as to the price really asked by the defendant for the land. Plaintiff can not maintain an action to recover his part of the booty: 2 Parsons on Con., 279; *Bartle v. Coleman*, 4 Peters, 184; *Bolt v. Rogers*, 3 Paige, 157; *Perkins v. Savage*, 15 Wend. 412; *Dedham Bk. v. Chickering*, 4 Pick. 314; *Nellis v. Clark*, 20 Wend. 24; *Moseley v. Moseley*, 15 N. Y. 334; *Chamberlain v. Barnes*, 26 Barb. 160; *Morgan v. Chamberlain*, Id. 163; *Gale v. Gale*, 19 Id. 250; *Miller v. Larson*, 19 Wis. 467; *Fargo v. Ladd*, 6 Id. 106; *Swartzer v. Gillett*, 1 Chand. 208, and cases there cited; 4 Wash. C. C. 297. 2. A person interested as a purchaser can not recover from the vendor commissions for making the sale, unless upon a contract to which all the parties to the purchase and sale are parties: *Watkins v. Cousall*, 1 E. D. Smith, 65; *Dunlap v. Richards*, 2 Id. 281.

COLE, J.

In the instruction given to the jury, as above recited, the circuit court in effect holds that the contract between the plaintiff and the defendant may be avoided if the parties had practiced a fraud upon Capt. Grant in inducing him to purchase the property for \$8,000. But is it not plain that the agreement between the plaintiff and defendant was not unlawful nor opposed to public policy? The counsel for the defendant admits—what surely could not successfully be controverted—that any commission, however great, agreed to be paid by the defendant as a compensation for making sale of his land, would not of itself be a fraud upon Grant. For, he says, in that case Grant would have treated with the plaintiff as the agent of the defendant, and bought with his eyes open, and had he paid a price larger than the defendant was willing to take, it would be his own folly, but that the defendant must, nevertheless, pay the agreed commission. But he argues and insists that on account of the confidential relation existing between the plaintiff and Grant, each was bound to act toward the other with the most scrupulous good faith and sincerity; and that in making the purchase neither could secure an advantage which the other was not entitled to share. The counsel, however, in this argument, loses sight of the real issue. This is not a controversy between Grant and the plaintiff, where the former is seeking redress for fraud and imposition practiced upon him by the latter, or by both him and the defendant. That is a different matter, and is independent of this agreement which the plaintiff is seeking to enforce. For, as we have already remarked, the contract between these parties was a legal one, not vitiated, as we can see, by the alleged fraud practiced upon Grant. It matters not what fraud and misrepresentation were employed to induce Grant to purchase the property and pay \$8,000 therefor, since the cause of action here is unconnected with, or is not founded upon, that illegal transaction. The test is, was the contract upon which the plaintiff is seeking to recover, void for fraud, or one which springs *ex turpi causa*? It seems to us that it is not. It is obvious that the defendant is seeking to avail himself of a fraud practiced upon Grant to defeat a

recovery upon a valid contract. We assume, for the purposes of the argument, that the conduct of these parties in making the sale to Grant was illegal and fraudulent, for which the law will afford him redress. And yet, if this cause of action is unconnected with the illegal transaction, and is founded upon a distinct and independent contract, it will not be affected by their subsequent unlawful conduct. When this agreement to pay this commission was entered into, the parties had no reference to Grant, nor any other individual. And this agreement was unobjectionable in law or morals. But afterward, in making the sale, the allegation is, the parties were guilty of fraudulent conduct and misrepresentations in inducing Grant to pay \$8,000 for the property, when the defendant was willing to take \$5,000. Suppose they were; let them answer, then, to the party injured. The maxim relied on by the counsel for the defendant, *Ex turpi contractu non oritur actio*, does not, as it appears to us, apply to the case. The court is not here lending its aid to enforce the performance of a contract which is illegal, or which is opposed to public policy, or founded upon an immoral consideration. No such objection to the validity of the contract sued on can justly be taken. The fraud which the court below seemed to think vitiated this contract, related to another matter and to a different transaction. The maxim above referred to is undoubtedly well established in the law, and it is not intended to violate it in this decision. That a court of justice, as a rule, "will not interfere between parties equally guilty, to adjust their controversies and apportion the shares to which they are respectively entitled accruing from a fraudulent, illegal and immoral enterprise," is a doctrine too well settled to admit of controversy. But the applicability of that rule to the actual case before us is not apparent. The question presented upon the record is quite kindred in principle to the questions involved in the cases of *Dyer v. Homer*, 22 Pick. 253, *Harvey v. Varney*, 98 Mass. 118, *Brooks v. Martin*, 2 Wallace (U. S.), 70, *Phalen v. Clark*, 19 Conn. 421, *Lemon v. Grosskopf*, 22 Wis. 447, and *Clemens v. Clemens*, 28 Id. 637, and is well illustrated by the discussions there found.

We have confined ourselves to a consideration of the applicability and soundness of the above charge, and really those

are the only material questions raised by the exceptions. We think the charge was not strictly applicable to the facts, and it was certainly calculated to prejudice the case of the plaintiff.

For these reasons the judgment of the circuit court must be reversed, and a new trial awarded.

By the Court.—So ordered.

WILLIAMS V. SPURR ET AL.

(24 Michigan, 335. Supreme Court, 1872.)

¹ No rescission between vendor and vendee, both concealing their opinions of the real value. The vendor, a dealer and speculator in iron mines, had discovered iron ore upon certain lands and had procured title to them on this account. The vendees, scientific men, had been upon the lands and discovered that this same ore was of peculiar quality and was of great value. Negotiations were opened for purchase. Vendees pretended that they wished the lands on account of the timber on them. Vendor represented that it was also valuable for iron, and sold it at a price much *more* than it was worth for timber—much *less* than it was worth for iron. *Held*, that vendor had no case to set aside the sale.

Appeal in Chancery from Houghton Circuit

This bill was filed by William W. Williams against John L. Spurr, Thomas B. Brooks, Raphael Pumpelly, William H. Stevens and Charles H. Palmer. The defendants answered and proofs were taken. On the hearing the bill was dismissed and the complainant brings the case up by appeal.

HUBBELL & CHADBOURNE, DOUGLASS & MILLER, SOUTHERLAND & WHEELER, S. F. SEAGER and ASHLEY POND, for complainant.

WILKINSON & SMITH, BALL & CHANDLER, MOORE & GRIFFIN, and GEORGE V. N. LOTHROP, for defendants.

CHRISTIANCY, Ch. J.

The bill was filed to set aside a sale made by complainant to Spurr, Brooks and Pumpelly, of certain lands in Hough-

¹ *Lynch's App.*, 97 Pa. St. 349.

ton county, in the Upper Peninsula, described as the north half of the southwest quarter, and the south half of the northwest quarter of section 24, in township 48, north, of range 31 west, on the ground of fraudulent concealment or misrepresentation as to their character and value; complainant claiming by his bill that he was himself ignorant that they had any value as iron lands, or for mines of iron upon them, and that he believed them to have no value except for the wood and timber, and that he was confirmed in this belief by the false representations of the defendants. The negotiations were by letter set forth in the bill, and will be noticed when we consider the evidence. The false representation upon which complainant alleges he was induced to sell the lands for eight thousand dollars, consisted in the representation made by Spurr, acting in concert with Brooks and Pumpelly, that the lands were valuable for timber alone, and were wanted by the purchasers for that purpose. The fraudulent concealment alleged is that the purchasers, knowing from previous exploration of a rich deposit of iron ore making the lands worth \$200,000 or thereabouts, fraudulently concealed the facts from the complainant; and he alleges the truth to be that defendants purchased the lands because of the existence thereon of said rich deposits of iron and not because of their wood and timber, while they lead him to believe directly the contrary.

We have carefully considered the testimony, and shall give nearly in full the correspondence leading to the sale. The balance of the testimony is in the main harmonious, but in some particulars somewhat conflicting, and instead of entering into a full analysis of it in this opinion, we shall content ourselves with stating the conclusions at which we have arrived as we have been able to deduce them from the whole evidence.

The complainant, who resided at Manlius, in the State of New York, but who had for some years been engaged in constructing the Sault canal, and other public works in that region, wishing to invest some money in mining lands or such as would be likely to prove valuable for iron mines, in the fall of 1860, went up to Houghton county for that purpose, and being previously informed that these lands, then belonging to

the United States, had iron upon them, and being situated on what was then and is still known as the "Iron Range," went out with one Holliday, who had previously been upon the lands, and found iron there, and in company with Holliday examined the lands, found the lines, and not only found iron ore in loose boulders, or what is called "float ore," but was shown by Holliday the bed or deposit of ore in the ledge or "in place" at several points on the land; and though not himself an expert in such matters, complainant was satisfied it was iron, and that the lands would prove a valuable investment as iron lands, and with this view he purchased the lands of the government in October, 1860.

Though the purchase was in his own name, and the legal title to the whole remained so up to the time of sale to defendants, yet at or about the time of the purchase he sold Charles H. Palmer a one third interest, and gave him a written agreement acknowledging that the latter had paid for the third interest, and agreeing to hold the same as trustee for him, "subject to such decision as the parties might direct from time to time."

About the same date, or shortly after, complainant bought a much larger quantity of lands near L'Anse on the same "Iron Range" as, and for, iron lands, in part of which Palmer also was interested.

It does not appear that any offer had been made for the purchase of the lands in controversy until late in the year 1867, when Mr. C. C. Douglass (who it seems from the testimony, also owned and was dealing in iron lands in that neighborhood) applied to complainant to know what he would take for the lands here in question. And on the sixth of December, 1867, complainant writes to Palmer: "I have just seen Mr. C. C. Douglass, and he wanted to know what we would take for our iron property over near Lake Michigammi. I told him if you were willing, we would sell for six thousand dollars cash; and he wanted I should write you and get an answer from you as soon as I could." It is admitted that this letter refers to the land now in dispute. On the 31st of December, Palmer answers him, saying: "The land * *

* consists of one hundred and sixty acres. At six thousand dollars it would be about forty dollars per acre. I would sell at \$6,000. What does Douglass want of it? Does

he want it to go with some of his own lands? My opinion now is to sell most decidedly." He also says in a postscript: "I wish you would write at once about the sale of iron land. Knowing what Douglass wants of it you can tell well enough what is the most he will give for it; and that price I would take. It is generally better to do well than to wait upon the uncertainties of doing better."

For some reason not explained, no sale was made to Douglass; and it does not appear that any other offer was made to purchase until that which resulted in the sale now in controversy.

The evidence shows that these lands, without reference to the iron supposed to be upon them, were of no great or peculiar value for their timber; that lands equally valuable for their timber could have been purchased in large amounts in that neighborhood, at the time of this contemplated sale to Douglass, at from \$2.50 up to \$5 per acre; and that the price for such timbered lands was but little higher when these lands were sold to defendants; that complainant never would have purchased them on account of any value they might be supposed to have as timbered lands, and that if he had considered them valuable only for their timber he would not, at the time Douglass proposed to purchase, have placed upon them a higher value than \$5 per acre or \$800 for the one hundred and sixty acres, and would have considered it an advantageous sale at that price. But he bought them as iron lands and spoke of them as such in his correspondence with Palmer, and treated them as such in fixing the price.

In fact we are satisfied from the evidence that the lands were then quite generally known as iron lands among intelligent men in that region, and that to several explorers and dealers in iron lands they were at this time, or at least prior to the negotiation with defendants, known to contain the deposit of magnetic iron ore, which is now supposed to give them their peculiar value, though the parties cognizant of this were reticent about it, in hopes perhaps of some day purchasing to advantage.

We now come to the transaction which resulted in the sale in controversy.

Some time about the 1st of October, 1868, defendants Spurr

and Brooks were on this land and found iron there, which they were satisfied rendered it valuable, though their exploration was a very slight one, of but two to four hours, a considerable portion of which was spent in the attempt to find the section line, to determine whether it was on section 23 or section 24, where the iron was found, in which, however, at this time they failed; but they became satisfied it was near the line, and if on 23, that it extended also onto section 24, the lands of complainant.

On the 3d of October, 1868, defendant Spurr wrote to complainant, saying: "I have some hard wood timber lands at the west end of Lake Michigammi, and having an offer to close a large wood contract with the railroad company for a term of years, I am a little doubtful whether I have secured timber enough to fill the contract; and having seen, from Banfield's map, that you are owner of some timber land on section 24, town 48, north, range 31, west, and having business at the Sault Ste. Marie, where I met your brother a short time since, I mentioned the matter to him, that I would like to purchase these timber lands, provided you wished to sell, and we could agree on price and terms of payment."

On the 10th of the same month the complainant, from his residence at Manlius, replies to this letter, that he is the owner of these lands (describing them), and then proceeds to say: "I do not know as you are aware that there is a very good show of iron on this land, but still I will sell it very reasonable, if you wish." He then tells him he will sell it for \$10,000, and that he don't wish to sell any of it unless he sells the whole; and that he may pay one quarter down, and secure the other by mortgage, and pay within one year.

Now we are entirely satisfied that this letter of Spurr, so far as it indicates a wish to purchase the land for the sake of the timber and to fill a contract proposed by the railroad company for wood, was a bald pretense without any foundation in fact, and devised for the purpose of concealing his real object in making the purchase, and his real opinion of the value of the land. But this pretense is no more bald and destitute of foundation in truth than that of complainant in his bill—feebly sustained by his testimony—that he at this time, or subsequently, believed the land had no value except for the wood

and timber thereon. This is shown, not only by the fact, known to the complainant, of iron upon the land, and the other considerations already mentioned, but by the price of \$10,000 which he puts upon it, when, as we are satisfied, complainant would himself have thought \$1,000 a high price for it as mere timber land, without reference to the show of iron.

It is quite true he may have supposed, when he received Spurr's first letter, that he really wanted the lands for the timber, as Spurr had offered no particular price, but he was led into no belief that this was the only purpose for which the lands were valuable, as is shown by the price he fixes, which is \$4,000 more than he had been disposed to sell them to Douglass for, and by his declaration that there is a good show of iron upon the lands; and the subsequent correspondence shows plainly enough that the timber had ceased to cast its shadows over the minds or motives of the parties; and that the prospect that they would prove valuable for iron was the controlling idea with all the parties, notwithstanding the ludicrous attempt of Spurr, in his letter next to be noticed, to preserve his consistency, by pretending to cling to his first love for the timber, which he declares his associates have kindly consented he may enjoy. But complainant was not by this ludicrous pretense deceived into the belief that the lands were only valuable for timber, or that the defendants were purchasing on that account.

After the receipt of complainant's letter of October 10th, the defendant, Spurr, who was near the land, seems to have gone upon it again previous to the 22d of October, and ascertained that the ore he and Brooks had previously discovered was on this land. The snow at this time was some four or five inches deep, which rendered the examination more difficult. He and his assistant, however, succeeded in finding the iron ore as before, and took specimens of the same with him, which we are satisfied were shown to defendants Brooks and Pumpelly, who were better qualified than complainant to judge of its value from its appearance—Pumpelly being professor of mining in Harvard University, and Brooks being connected with the State geological survey. We are also satisfied that these defendants concealed their opinions of the value of the

ores, as any man in their situation, speculating in iron lands and contemplating a purchase from another speculator, would be likely to do; and we think it probable that the man who went with Spurr on the second exploration, and who doubtless heard him express his opinion of the value of the ores, was cautioned, and perhaps paid for keeping still about it. An assay was subsequently made of the specimens obtained, but it does not appear that any assays were made prior to the consummation of the purchase.

After this second exploration by Spurr, he, on the 22d of October, writes to complainant acknowledging receipt of his letter of the 10th of October, and saying: "As you spoke of there being a very good show of iron on it, I thought I would go and look it over; as I showed your letter to a party here that have been dealing some in iron lands, and they sent a man out with me, agreeing that if the show of iron was good they would take an interest and help me pay for it and let me have the timber. They sent a man out with me to make an exploration; but the weather was unfavorable, as the snow fell five inches night before last, and we could not make a thorough exploration; but we found some iron; but, in regard to quantity and quality, could not decide, as we were not prepared to do any digging, and there is so much lean ore in this country that will not pay for shipping, and as the specimens we brought in were not very satisfactory, the party think they would not want to invest at your price without knowing something more about the location; and as the snow is on, and probably will remain till spring, there will be no chance to make any further exploration before that time, but we have concluded to make you a liberal offer of \$6,000, to pay one third down, balance in two equal payments of \$2,000 each, at one and two years, secured by mortgage. As there have been so many iron shows we considered good, such as the Tilden Mine, Oyster Mine, Iron Cascade Mine, Seal Lake Mine, and many others, where they have spent hundreds of thousands of dollars in opening them, and they have all proved worthless, or did not produce a shipping ore, and are all abandoned on that account, I think we are taking all the chances and offering you a big price. On receipt of this please let me hear from you."

To this letter complainant replies on the 29th of October as follows: "Yours of the 23d instant is received; your offer I can not accept, but will split the difference with you if you wish. I will take \$8,000, and you can make the payments as follows: \$4,000 down and the balance secured by mortgage on the property, \$2,000 in one year and \$2,000 in two years. I consider this a low figure for the property, as I could have taken \$6,000 for it last winter; but I will sell it now, and as I said before, I consider it quite cheap; as I have been on the property, and am satisfied there is very good iron on the location. If you wish to close the bargain at this price, I will sell, but will not consider my offer binding unless taken soon."

Spurr being absent on the 4th of November, when this letter was received, defendants Pumpelly and Brooks opened it, and immediately telegraphed complainant in Spurr's name accepting the offer, and also wrote him explaining that they were the "party" to whom Spurr had referred in his letter as having agreed to take an interest with him, and say: "We therefore agree to, and formally accept, for John L. Spurr, as his agents and for ourselves, your proposition to sell lands and pay for them \$8,000—one half down, one fourth in one year and one fourth in two years; you giving us a good and sufficient warranty deed for the land when first payment is made, and we secure the balance of \$4,000 by mortgage. Mr. R. Pumpelly is going east in a few days, when he will complete the transaction, having full power from Spurr and Brooks to act in the matter. Mr. Pumpelly will write you in a few days when he will state definitely about the time." (Signed) "T. B. Brooks, Raphael Pumpelly."

This ended the correspondence in reference to the terms of sale; and about the 9th or 10th of December defendant Pumpelly called upon complainant at his residence in Manlius, New York, and a preliminary written contract of sale was drawn up, and signed by him and complainant, in accordance with the terms agreed upon by the correspondence, providing for the payment, within sixty days from that date, of the \$4,000 (\$500 of which was paid down), and for the execution of the deed by complainant, and a mortgage and notes by Pumpelly, stating that there was supposed to be certain in-

cumbrances by way of tax titles, and that if complainant did not extinguish them in sixty days, then he was not to convey except at the option of the purchaser, to take a deed subject thereto without warranty, in which case the price was to be \$7,000 instead of \$8,000.

During the interview on this occasion the complainant spoke of the lands as iron lands, and both parties in their conversation treated them as such, and the complainant gave Pumpelly to understand that he had seen the exposure of the iron ledges on the land, but said he was willing to sell this land because he was interested in a much larger tract of iron land near L'Anse, which promised much more speedy development. The subject of timber or timbered lands was not spoken of in these conversations.

Complainant, after this preliminary contract and prior to the 8th of February, 1869, seems to have gone himself or sent some one (from the bill of expenses rendered to Palmer it is rather to be inferred he went himself) to Houghton county, where the lands are situated, and got up the tax titles, and on the 8th of February, 1869, complainant met defendants Pumpelly and Brooks in the city of New York. The \$4,000 (including the \$500 previously paid down) were paid, the warranty deed given, and complainant received the mortgage and notes of defendants Pumpelly, Brooks and Spurr, for \$4,000, payable in one and two years. During this interview, also, complainant and all parties spoke of the lands as iron lands, and complainant expressed great confidence in their value for iron ore, and nothing was said of them as timbered lands.

The purchase was thus closed, apparently to the entire satisfaction of complainant, and it may not be amiss to inquire when and under what circumstances complainant became dissatisfied and first complained of fraud on the part of the defendants.

Complainant having reported this sale to Palmer about the middle of April, 1869, and sent him the note of \$2,000, due in one year, and less than his one third of the money, Palmer, who believed the land was worth more than it had been sold for, and not having been consulted, as soon as he learned the facts connected with the sale repudiated it. See *Palmer v. Williams*, 24 Mich. 328.

But in June, 1869, before Palmer had learned the facts or brought his bill to set aside the sale as to his one third, complainant was up in Houghton county (where the lands are) and met Palmer there, and they had several conversations there about the sale, Palmer insisting that complainant had sold his (Palmer's) interest without authority. Complainant still had large interests in iron lands in that region, in part of which Palmer was also interested. During this period, while Williams was up there, it was the common talk and belief among the people there, that the lands in question had been found, or were believed to be of very great value for iron, though it had not been opened or worked, and was not, even up to the time the evidence in this case was taken, and the evidence shows that until thus opened and worked it can not be known whether it will prove of much value or not. Complainant seems to have made no complaint of being defrauded until long after Palmer had filed his bill against him and Pumpelly, Brooks and Spurr, to set aside the sale as to the one third, when, as he had given a warranty deed, it began to be apparent he might be held responsible on his covenant, and when, as he says, Palmer rather advised him to bring a bill to set aside the whole sale. But he says it was not till February or March, 1870, that he first became aware that Spurr, Brooks and Pumpelly knew of the existence of valuable iron ore on the land before they purchased, and intimates that if he had known it he would not have sold it as he did. This was some six months at least, after it had become notorious in all the mining country that this was believed to be one of the most valuable iron tracts in the whole iron region, and when it was estimated anywhere from \$60,000 to \$120,000. And it was not till the 15th of May, 1870, that complainant applied to defendants to rescind the sale, or notified them that he claimed it to have been fraudulent, and offered to pay back the money he had received and to return the notes and mortgages.

Such are all the material facts in the case, and, so far from sustaining the main ground upon which complainant rests his claim to relief, that up to the time of the sale he supposed and believed the lands had no value except for the wood and timber, and was ignorant that they had any value as iron land,

and that he was misled into, or confirmed in this belief by the acts, representations, or concealment of the defendants, the evidence clearly and affirmatively shows that such ignorance and such belief on his part is a sheer pretense, not only unsupported, but clearly disproved by the evidence. It shows that he was, and for some time had been, dealing in iron lands in that region as a speculator; that these lands were entered by him as such, after he had discovered the iron upon them, and with a view to their sale as iron lands, spoken of, offered and treated as such on all occasions, and the price previously, and upon this sale, fixed upon this basis, and not at all with reference to their value as timbered lands; that the value of the mines upon these lands, like that of all others which had not been opened or worked, was in a great measure speculative, in which hope, anticipation, and visions of future possibilities, rather than actual knowledge or present realities, constituted the controlling elements; that though some opinion of the chances might be formed from the surface show, yet, however favorable this might be, until opened and worked, the real value could not be known, and the purchase must be made in the nature of a lottery.

Complainant had himself been on the lands and seen the exposure of the iron ore in place, or in the ledge, at several places, as well as the boulders, or float ore. And though the defendants, previous to his letter of October 10th, had not informed him that they had examined the lands, yet when he informed them that there was a good show of iron upon them, and proposed to sell them for \$10,000, this was equivalent to an invitation to them to examine the lands for themselves, and to form their own opinion of its value, for he certainly could not have expected they would purchase at anything near the price he had fixed without first making an examination, nor unless they should find what, in their opinion, would render them profitable at that price as iron lands. Nor had he any reason to expect they would report to him their discoveries, or their real opinion of the character and value of the ores they might find. On both sides they were dealers and speculators in iron lands; there was no relation of confidence between him and them; they were dealing with each other at arm's length; and the whole course of the correspondence

shows that each party expected the other to obtain his own information in his own way, and to decide as to the value at his own risk, and that neither was acting in reliance upon the statements of the other as to the value of the lands.

From the evidence it does not appear that the exploration made by the defendants was really any more thorough than that made by complainant, nor does it appear that they had discovered any deposit or exposure of ore which he had not seen. The fair inference from the evidence is that their discoveries upon the ground were substantially the same; both having discovered the same thing, the iron ore in place. It does not appear that complainant took specimens, though he had the same opportunity to do so as the defendants. But the defendants, or some of them, being more scientific, were better qualified to judge of the value of the ore from its appearance, or such other properties or manifestations as might appear without an actual assay; and they had a perfect right, under the circumstances, to make use of their superior and scientific acquirements, which were their own property and not that of complainant, and the latter had no right or claim to profit by the better opinion they might thereby have been enabled to form. Had they been employed by him to make an examination for his benefit, or had they stood in any fiduciary relation to him, or had he been ignorant of any show of iron upon the lands, the case might have been different. But under the circumstances, and the relations in which the parties stood to each other in the course of this negotiation, they were not only at liberty to conceal from complainant any opinion they might have formed of the value of the ores, but any discoveries they might have made, so long as they did nothing to prevent him from making any examination he should choose to make, or from adopting his own course to obtain such information as he might choose to obtain at his own expense and in his own way; and the evidence does not show that they did anything of this kind, nor that he relied, or, expected or intended to rely, for his own opinion of the value upon any information from them. He clearly relied upon the examination he had himself made, and they relied upon such as they chose to make, and each must abide the result.

The decree of the court below must be affirmed, with costs to the defendants, of both courts.

The other justices concurred.

¹ GETTY ET AL. V. DEVLIN ET AL.

(54 New York, 403. Commission of Appeals, 1873.)

Sale by subscription headed by decoy subscribers. Certain owners of oil interests prepared a subscription agreement, by which each subscriber was to pay the amount set opposite his name, toward the purchase of the property, which was to go to a corporation to be organized. Each owner subscribed \$5,000, and caused others to sign these subscriptions, which were marked paid, but were not in fact intended to be and never were paid. Plaintiffs, with others, believing these subscriptions *bona fide*, subscribed and paid their money to one of the owners, who divided it with his co-owners. The corporation was organized and stock issued. *Held*, that the subscription paper was a fraud upon all the signers who had paid upon it, and that the associates in the scheme (the original owners) were at least liable to account to the *bona fide* subscribers for their profits on the sale to the corporation.

² **Good faith required between associates.** Each person engaged in a common enterprise has a right to expect from his associates good faith in all that relates to the common interest, and if a party pretending to be a purchaser in common with others, be in reality the seller, he must account for the difference between what the property cost him and the price he received for it.

³ **No recovery of purchase price with rescission.** There can be no action by the defrauded against the guilty party for the direct recovery of the entire consideration paid, until after complete and prompt rescission; and though rescission be impossible (unless prevented by the guilty party) the rule remains the same.

Appeal from judgment of the General Term of the Supreme Court in the First Judicial District, affirming a judgment in favor of the defendants, entered upon the decision of the court at Special Term.

This action was brought to obtain relief on account of a fraud alleged to have been committed upon the plaintiffs in the purchase and sale of oil lands, and the formation of the

¹ Same case on second appeal, 7 M. R. 119.

² *Short v. Stevenson*, 6 M. R. 629.

³ *Byard v. Holmes*, 6 M. R. 598; *Scott v. Kittanning Co.*, 3 M. R. 159.

Federal Oil and Coal Company. The alleged perpetrators of the fraud and the executors of a deceased one, and all the stockholders of the company and the company itself, were made parties. The facts appear sufficiently in the opinion.

Upon those facts the court found, "that neither the defendant, John Bryan, nor Daniel Devlin, deceased, made, or authorized to be made, any representation that they, or either of them, were or was not an owner of the lands and leasehold interest in question, nor did they or either of them say or do anything, or authorize any one to say or do anything, to induce the plaintiffs to believe that they, or either of them, had no interest as owner therein, nor did they, or either of them, fraudulently or otherwise, conceal or take any measures to conceal the knowledge of their or either of their ownership or interest therein. Nor did they or either of them make any false representation to the plaintiffs or any other subscriber on the subject of said land, or their or either of their interests therein."

And as conclusions of law, "that the complaint in this action as to the defendants, John Bryan and Jeremiah Devlin and Henry F. Spaulding, as executors of the last will and testament of Daniel Devlin, deceased, should be dismissed with costs."

Judgment was entered accordingly.

SAMUEL HAND, for the appellants.

It was error in law for the court to find a fact unsupported by evidence, or to refuse to find a fact proved by uncontradicted evidence: *Mason v. Lord*, 40 N. Y. 476; *Putnam v. Hubbell*, 42 Id. 106. It is not necessary, in order to maintain this action, to show actual fraudulent representations by Bryan or Devlin personally: *Leslie v. Wiley*, 47 N. Y. 650; *Bennett v. Judson*, 21 Id. 238; *Elwell v. Chamberlain*, 2 Bosw. 230; *Hunter v. H. R. Iron Mach. Co.*, 20 Barb. 493. It was a fraud *per se* for the four defendants to sign the agreement in the pretended character of co-purchasers, and to conceal the fact that they were the real sellers: *Conkey v. Bond*, 36 N. Y. 427. The concealment from plaintiffs of the cost of the property was a fraud: *Hitchens v. Congreve*, 4 Russ. 562;

Conybeare v. N. B. R. Co., 1 De Gex., F. & J. 578; *Carpenter v. Danforth*, 19 Abb. Pr. 225; *Bliss v. Matteson*, 45 N. Y. 22; *Overend Gurney & Co. in re*, 3 L. R., April, 1867, Eq. Series, 619-624. The use of decoy subscribers was a fraud: *Blake's Case*, 34 Beav. 639; *Ross v. Estates Invest. Co.*, L. R. February, 1867; 3 Eq. S. 134-137. The contract was vitiated on account of fraud in its formation: 2 R. S. 677, § 53; *Rex v. Barnard*, 7 Car. & P. 784; *Foss v. Harbottle*, 2 Hare, 461; *Conkey v. Bond*, 36 N. Y. 429; *Rawlins v. Wickham*, 3 De G. & J. 304. Devlin was trustee of the trust created by the original agreement, and is accountable to plaintiffs for a breach thereof: *Robinson v. Smith*, 3 Paige, 223. Devlin's executors are proper parties to an action to redress a breach of the trust: *Cunningham v. Pell*, 5 Paige, 607; *Knatchbull v. Fearnehead*, 3 M. & C. 122; *Munch v. Cockrell*, 8 Sim. 219; *Perry v. Knott*, 4 Beav. 179. Plaintiffs, in order to rescind the contract, were not obliged to reinstate the perpetrators of the fraud in the condition they were in at first: *Masson v. Bovet*, 1 Den. 69.

JOHN E. DEVLIN, for the executors of Daniel Devlin, deceased, and Henry F. Spaulding, respondents. The decision of the General Term, affirming a judgment of Special Term on exceptions to the findings of fact by a judge trying a cause without a jury, unless such findings are clearly against evidence, is final: *Browne v. Vredenburg*, 43 N. Y. 195, 199; *Mason v. Lord*, 40 Id. 476; *Burgess v. Simonson*, 45 Id. 225; *Field v. Munson*, 47 Id. 221. Unless plaintiffs restored or offered to restore defendants' testator to his original condition they could not recover: *Voorhees v. Earl*, 2 Hill, 288; *Masson v. Bovet*, 1 Den. 69; *Wheaton v. Baker*, 14 Barb. 594; *Minturn v. Main*, 7 N. Y. 220, and cases cited; *Matteawan Co. v. Bentley, etc.*, 13 Barb. 641; *Nichols v. Michael*, 23 N. Y. 264, (272).

FRANCIS KERNAN, for John Bryan, respondent.

The conclusions of the court below as to matter of fact are conclusive in this court, when there is any testimony to sustain them or a conflict as to them: *Fellows v. Northrup*, 39

N. Y. 117; *Putnam v. Hubbell*, 42 Id. 106, 113. Clear and satisfactory evidence is required to prove fraud: 1 C. & H. Notes to Phil. Ev., 297, 298, and cases cited. There is nothing from which constructive fraud can be made out to render the agreement voidable and authorize the court to rescind it: Story's Eq. Jur. §§ 315, 316; *Davoue v. Fanning*, 2 J. Ch. 252, and cases cited; *N. Y. Ins. Co. v. Nat. Pro. Ins. Co.*, 14 N. Y. 85, 91; *Conkey v. Bond*, 36 Id. 427; S. C. 34 Barb. 276. Even if there had been fraud, actual or constructive, plaintiffs are not entitled, upon the case made, to have the agreement rescinded, and the money paid for the land and leases refunded: *Cobb v. Hatfield*, 46 N. Y. 533; *Masson v. Bovet*, 1 Den. 69, 73, 74; *Baker v. Robins*, 2 Id. 136; *Mayer v. Shoemaker*, 5 Barb. 319; *Wheaton v. Baker*, 14 Id. 594; *Fisher v. Fredenhall*, 21 Id. 82; Willard's Eq. Jur. 302, 303; *Sar., etc., R. R. Co. v. Row*, 24 Wend. 74. Bryan's intent was an issue in the case, and evidence thereon was competent: *Seymour v. Wilson*, 14 N. Y. 567.

EARL, C.

The following are the facts established on the trial of this action by uncontroverted and undisputed evidence. Prior to February 22, 1865, the defendant, John Bryan, purchased leasehold interests in certain lands situated in the State of Ohio, and obtained in his own name leases or assignments of leases of such lands. The actual cost to him of such leasehold interest did not exceed the sum of \$15,300. Prior to the same date the defendant, Robert H. Arkenburgh, or Bryan in his name, had obtained contracts for the purchase of lands in Ohio in fee, at a cost of not exceeding \$15,000. These purchases and contracts were made through the agency of the defendant, Jacob S. Atwood, who knew the actual cost of the leasehold interests and lands. Prior to the same date, defendants Arkenburgh, Bryan and Atwood came to an understanding with Daniel Devlin, since deceased (whose executors were made defendants), that he, Devlin, should pay Bryan \$7,650, and should be entitled to one half the interest Bryan then had in the property, and that all the property should be sold and disposed of for their joint benefit, and that Atwood

should be entitled to one third of the profits arising from the sale, and that out of the residue of the proceeds the original cost of the property should be paid to Devlin, Arkenburgh and Bryan, and the remainder divided equally between the three last named. In pursuance to this understanding, and to carry into effect the scheme of disposing of such lands, they procured the following paper to be drawn, to wit:

"We, the undersigned, do hereby subscribe and agree to pay forthwith the amount set opposite our names for the purchase of property in Washington, Monroe and Athens counties, Ohio, as per memorandum annexed, being leasehold interest in 745 acres, and 207 acres in fee, at the sum of \$125,000 (one hundred and twenty-five thousand dollars), payments to be made to Daniel Devlin, Esq., at Broadway Bank, trustee for the purchasers, in whose name the title to the property shall be taken, said property to be put into an association for development upon such terms as these subscribers may elect after this subscription is complete."

"New York, 22d February, 1865."

To this paper was attached a description of the real estate therein referred to, being nearly all the real estate purchased and taken by Bryan and Arkenburgh as above stated. The said paper was subscribed first by said Devlin and then by defendants, R. H. Arkenburgh and Bryan, each for \$5,000, before either of the plaintiffs saw the same, and was left in the hands of Atwood with the understanding that he should procure other subscribers thereto. Atwood subsequently subscribed the paper for \$5,000. At the time of subscribing neither Devlin, Arkenburgh, Bryan nor Atwood intended to pay any money upon their subscriptions, and did not, in fact, pay anything. After the paper had been signed by Devlin, Arkenburgh and Bryan, it was signed by the plaintiff, Holcomb, for \$5,000, J. A. Amelung & Son, as a firm, for \$5,000, and R. P. Getty & Son, as a firm, for \$5,000, and by the other defendants, the entire subscriptions amounting to \$125,000. The plaintiffs paid their subscription to Devlin, and of the other subscriptions nearly \$50,000 in amount was also paid to him. The balance of the subscriptions was not paid, and such subscriptions were not made in good faith, were not intended to be paid when made, and were procured wholly or in

part through the agency of Devlin, Bryan, Arkenburgh, and Atwood or some one of them, with the understanding that they were not to be paid. It was proven that some of such subscriptions were made in the name of the friends and relatives of the persons last named, and marked paid, with the understanding that they were to hold their interests as presents from them. The \$64,500 thus paid to Devlin was subsequently deposited with or paid to Arkenburgh and Bryan, who were copartners, except that Devlin retained the amount coming to him under the above-mentioned agreement as to the division thereof.

The plaintiff, Holcomb, was induced to subscribe the agreement by the false representations made to him by Atwood that the property cost \$125,000. The defendant, A. A. Gifford, was the son-in-law of Atwood, and was a subscriber for \$5,000, which was marked paid, but which he never paid nor intended to pay, and he took the agreement to procure subscribers thereto, and the plaintiffs, Getty and Amelung, subscribed the same at his solicitation. He represented to them, in order to induce them to subscribe, that the lands had cost \$125,000, and that the subscribers would have the same at their original cost. The plaintiffs believed these representations and supposed that the lands purchased in Ohio cost or were to cost the \$125,000.

After the subscriptions had been made to the extent of \$125,000, a meeting of the subscribers was called and steps taken to organize a company to take and develop the land. The Federal Oil and Coal Company was finally organized as a corporation under the laws of this State, with a capital of \$1,000,000, divided into 100,000 shares of \$10 each. That the stock might be regarded as paid-up stock, it was arranged that Bryan, who then held all the lands, should convey them to the company for the whole amount of the stock. This was done, and then he transferred the stock to Devlin in trust for all the subscribers for the \$125,000. Of the stock, 20,000 shares were reserved for working capital, and the balance was distributed to the subscribers, 3,200 shares for each subscription of \$5,000.

When a committee of the stockholders called upon Bryan to examine the titles of the lands, they did not inquire of him

what they had cost him, but he exhibited to them the leases which had been assigned to him, in which the true consideration paid by him was not stated. He did not inform such committee, nor any of the *bona fide* subscribers, what the lands had cost, nor how much profits he and his three associates were to make by a sale of them to the company, but intentionally concealed these facts, well knowing that his scheme would be defeated if he disclosed them.

After the organization the plaintiffs and other stockholders advanced money to the company to develop the lands and carry forward the operations of the company. For moneys thus advanced, the plaintiffs subsequently proceeded against the company, and sold lands of the company, and realized a portion of the money thus advanced. The plaintiffs did not discover the fraud which they claimed had been perpetrated upon them until after the death of Mr. Devlin; and before they commenced this action they tendered to his executors a release of their stock in the company, and demanded of them the money which they had paid upon their subscriptions. Devlin, Arkenburgh, Bryan and Atwood divided the \$64,500 between themselves, according to the agreement above mentioned, which they had made for the division thereof.

These facts stand clearly out in the case undisputed, and the question for us to determine is, whether upon them the plaintiffs are entitled to any relief, and if they are, what relief.

We have, briefly, this state of things: Devlin, Arkenburgh, Bryan and Atwood, owned certain lands, situate in the State of Ohio, which had cost them, in round numbers, \$30,000. They conceived the design of disposing of them to a company at a large advance and dividing the profits between them, and for this purpose took steps to organize a company. They procured the subscription paper to be drawn in which the subscribers agree to pay the sums set opposite their names "for the purchase of property" in Ohio, at the sum of \$125,000.

They subscribed the paper not intending to pay, and knowing they would not have to pay their subscriptions, and they then caused the paper to be circulated and subscriptions to be procured, and for the purpose of filling up the subscription

they gave away, in what may properly be called decoy subscriptions, about half of the amount to be subscribed. The plaintiffs subscribed upon the fraudulent assurance that the original cost of the land was \$125,000, and upon the belief that they became subscribers on a footing of equality with all the others. The money subscribed was paid to Devlin, who acted as trustee for the subscribers, and also for his three associates. He retained his share and the balance he paid over to Bryan, and by him it was divided among himself and the other two, and the four thus shared profits exceeding \$30,000 in money, besides having as much stock as those who paid their subscriptions in cash.

I think there are several grounds upon which the plaintiffs can base a right of recovery in this action. The subscription paper itself contains substantially a representation that the subscribers were to purchase the lands in Ohio at a cost of \$125,000. It imported a joint adventure for the purchase of the lands from persons not subscribers, at the price named, in which all the subscribers were to be interested as purchasers upon the same footing, in proportion to their subscriptions. When the four defendants sent forth this paper with their names subscribed to it, they represented that they would pay the sums by them subscribed for the purchase of the land. No person reading the paper and seeing their names to it as subscribers, would suppose that they had already bought the lands, and that they were really the sellers and in no sense purchasers. The fair implication was that the lands were to be bought of the owners, and that such owners were not any of those who subscribed as purchasers. The natural inference which a party subscribing would draw was, that each was engaging in an enterprise for the mutual and common benefit and advantage of all, and that each had a common interest with the others according to the amount of his subscription. Hence, when the four defendants put this paper in circulation, with their names subscribed to it for sums which they did not intend to pay, intending to palm off upon the subscribers real estate for \$125,000, which cost them but \$30,000, and if they succeeded fully in their scheme, thus dividing among themselves, at least, \$90,000 in profits, they perpetrated a gross fraud upon every subscriber who was ignorant of the facts, for which they may

in some form, upon the plainest principles, be held responsible.

There is another ground of liability. The subscribers to the paper agreed jointly and for their mutual benefit and advantage, to purchase certain lands, designated, for a price named. No one of the subscribers could, after this, purchase the lands for a less price and compel his associates to allow him more than he paid. His purchase would inure to the benefit of all the subscribers. That this is so, is so thoroughly settled, both upon principle and authority, that it will not be disputed. In all such cases, the subscribers enter into relations of trust and confidence with each other.

They engage in a common enterprise for their mutual benefit, and have the right to demand and expect from their associates good faith in all that relates to their common interests. Equality and mutuality of burdens and benefits is implied in all such enterprises in proportion to the amounts subscribed, and no one of the subscribers can be permitted to take to himself a secret or separate advantage to the prejudice of his associates. If this be so as to a purchase made after the subscriptions are written, why should not the same rule be applied to a purchase made before?

The wrong and breach of faith is just as great, and every reason and authority showing that the rule should be applied in the one case would show that it should be applied in the other. *Bently v. Craven*, 18 Beavan, 75, is an authority quite in point. There, one of several partners was employed to purchase goods for the firm. He, unknown to his copartners, supplied the firm, at the then market price, with goods previously bought by himself for his individual business when the price was lower, and so made considerable profit. The master of the rolls held that the transaction could not be sustained and that he was accountable to the firm for the profits thus made. Hence, upon this theory, these four defendants, in dividing the large profit among themselves, perpetrated a fraud upon all the *bona fide* subscribers, for which they are accountable in some form.

But there is still another ground upon which the plaintiffs can base their right to recover, equally apparent. The four defendants had agreed among themselves to be jointly inter-

ested in the lands, and that they would put them into a company at a large price above their cost and divide the profits between them. In pursuance of this agreement they took measures to organize a company, and for that purpose had drawn up the subscription paper and signed it, and caused it to be circulated for subscribers.

In this adventure of getting up the company, selling the lands and dividing the profits, they may be regarded as partners. It matters not that the title to the lands was not in all the partners, nor does it matter that there were no written articles of copartnership between them. Such a copartnership could be created by parol, and particularly after the partners have acted as such to the final termination of the adventure and divided the profits between them, they are certainly in no position to deny the existence of a valid copartnership. It was part of the business of this copartnership to get up this company and sell these lands to it; and all that one copartner did and represented while engaged in this business bound the others, and all are responsible for the false and fraudulent representations made by either in the same business. All these questions were discussed and decided in the case of *Chester v. Dickerson*, decided at the last March term of this commission (54 N. Y. p. 1), and, therefore, need no further consideration at this time. Hence, the four defendants are responsible for the false and fraudulent representations made by Atwood to induce Holcomb to subscribe. They must also be held responsible for the false representations made by Gifford to induce the plaintiffs, Getty and Amelung, to subscribe. He was not sworn, and it does not appear positively at whose instigation he acted. He was a son-in-law of Atwood, and one of the persons to whom a subscription of \$5,000 was given; at least, he subscribed and never paid; and yet his subscription was marked paid. He was engaged in procuring subscriptions to the paper which the four defendants caused to be drawn, and he was at work in their interest and in the furtherance of their scheme, and they enjoyed the advantage of what he did. It is not too much, therefore, to hold upon these facts, unexplained and uncontradicted, that he was acting upon the employment or instigation of the four defendants or some one of them; and

if he did, they are all responsible for his acts and misrepresentations.

I am, therefore, clearly of the opinion that the plaintiffs were entitled to relief in some form. They could not, on account of the fraud, recover back all the money paid by them, because they could not restore the four defendants to the position they were in before the transfer of the real estate to the company. The real consideration for the money subscribed and paid was the real estate which was conveyed to the company at the request of the subscribers. The company took the title to the real estate, and then their interest in the company, and through it in the real estate, was represented by shares of stock. The plaintiffs did not place the four defendants in the position they were before the real estate was conveyed, by returning their stock, because what the defendants parted with was the real estate, and that had passed beyond their control. The plaintiffs caused it to be seized and sold for their debts against the company, after the discovery by them of the fraud of which they complain. It is a rule, quite uniform, that a party who seeks to recover back money which he has been induced to pay for property by fraud, must restore the property before he can rescind the contract of purchase and recover the money paid. And he must act promptly upon the discovery of the fraud: *Cobb v. Hatfield*, 46 N. Y. 533; *Masson v. Bovet*, 1 Denio, 69; *Mayer v. Shoemaker*, 5 Barb. 319. It matters not, so far as I can discover, that it is difficult or even impossible for him to do so, so long as he is not prevented by the act of the wrong-doer. Before he can adopt this form of remedy he must do it, and the action in such case may be at law. All the defrauded buyer has to do is to tender back what he has received, and then he can commence his action at law to recover the money paid. In this case, if the tender of the release of the stock was sufficient, no resort to equity was necessary or proper, as each one of the plaintiffs could at once, after the tender, have sued in an action at law to recover the amount of money paid by him. A joint action by all the plaintiffs would not have been proper. Hence, this action can not be maintained for the recovery of the entire amounts paid by the plaintiffs, upon the theory that they have restored to the four defendants all that they parted with for the plaintiffs' money.

The plaintiffs could each have sued the defendants to recover damages for the fraud perpetrated upon him in procuring his subscription, and could, probably, have recovered the difference between the actual value of what he received and the amount paid by him. But such an action would have been a common law action, to which each person or firm defrauded would be plaintiff, and the wrong-doers alone defendants.

This is not such an action. But I think, under the complaint in this action, the four defendants may be compelled to account for the profits they made upon the real estate, and which they fraudulently appropriated to the exclusion of their associates. The court can ascertain what the land actually cost the four defendants, and hold them to account for the balance. This balance equitably belongs to those who paid the money, and the plaintiffs can, in this action, recover their *pro rata* share thereof. It may be that the four defendants should account for their own subscriptions as if paid, and also for such subscriptions as they gave away; and it may also be that there should be a redistribution of the stock among the *bona fide* subscribers alone. But these matters of detail we do not determine; it is sufficient that the plaintiffs are entitled to some relief of the character indicated.

It matters not that the court at special term found all these transactions to be innocent and free from fraud. No finding of any court can change the character of the undisputed facts, and the vigilant eye of justice must have grown dim indeed if it can not find some remedy for such a wrong.

The judgment must be reversed and new trial granted, costs to abide the event.

All concur, except Lorr, Ch. C., not sitting.

Judgment reversed.

LEAMING ET AL. V. WISE ET AL.

(73 Pennsylvania State, 173. Supreme Court, 1873.)

¹ **Right to rescind, lost by delay.** Where there is undue delay in the offer to rescind a contract, and the value of the stock which should have been tendered on the discovery of the fraud, has meanwhile declined, it amounts to an affirmance of the contract and the right of rescission is lost.

² **Reasonable time, a question of law.** Where the facts are undisputed, what is a reasonable time or an undue delay is a question of law for the court.

February 18, 1873. Before READ, C. J., SHARSWOOD, WILLIAMS and MERCUR, JJ. AGNEW, J., at Nisi Prius.

This was an action of assumpsit brought October 30, 1869, by I. Fisher Leaming and another, trading as Waln, Leaming & Co., against Charles Wise and Ellwood T. Pusey, to recover back money paid by plaintiffs to defendants for oil stocks, alleged to have been sold under false representations.

The case was tried January 5, 1871, before LYND, J.

The plaintiffs' evidence was that in March or April, 1864, they bought from the defendants 3,000 shares of stock in the Watson Petroleum Company and Great Western Oil Company at \$3 per share for the one and \$2.50 per share for the other; that the defendants represented to them that if they bought the stock they would get it at the same price at which the defendants themselves took it, being only the actual cost of the land and 50 cents per share for working capital; that defendants also represented that other persons, whom they named, and whose judgment as to oil stock ranked high in the community, had purchased stocks at the same price; that some time afterward they learned that the statements in regard to the cost of the land, etc., were inaccurate, and March 2, 1866, they tendered the certificates of stock to the defendants, and gave them notice that they rescinded the contract.

¹ *Woodruff v. North Bloomfield Co.*, 1 West C. R. 87.

² *Patterson v. Hitchcock*, 5 M. R. 542; *Luckhart v. Ogden*, 2 M. R. 602.

The plaintiffs gave other evidence in support of their case and closed.

The defendants gave evidence in contradiction of the plaintiffs as to the representations; among other things, that when the plaintiffs purchased the stock nothing had been said about the price of the land or the cost of the stock.

They gave evidence also that in October or November, 1865, they had informed the plaintiffs what the land cost, which was less than the amount the plaintiffs said they had put it at when they bought the stock; that the plaintiffs had afterward paid an assessment on the stock; that there was no tender of the stock till after the wells had been finished and the working capital exhausted; that the companies had put down two wells, but had not got any oil, etc.

The defendants submitted six points. The fourth with its answer was:

"If the plaintiffs were informed by Charles Wise, in October, 1865, of the original cost of the land, and did not then repudiate the contract, but waited until March, 1866, taking their chances of oil being obtained in the meantime, and only made offer to return when the working capital was exhausted and the wells a failure, they are not entitled to recover."

Answer: "This I have pretty well covered in my general charge, and I say further, in specific answer, that if you find the facts as put in this point, then the conclusion of law that the plaintiffs are not entitled to recover is correct."

In the general charge, the court said on this point:

"In the fall of 1865, it was that Mr. Wise told Mr. Leaming, Sr., the actual cost; it was after that that the assessment was paid. 'I think I went to his counting house in October, 1865. It was not more than three or four weeks later in October, 1865. There was no tender of the stock until after the working capital was exhausted.'

"Now, gentlemen, upon this subject I simply instruct you: 1. If you find that the plaintiffs were informed of the price of the land by Mr. Wise in October, or early in November, 1865. 2. That the plaintiffs did not offer to return to the defendants the stock in question for one or more months after such information was given (the date is

given, the evidence is March the 2d, 1866); that the price of the stock had fallen between the time of the receipt of the information and the time of the tender, or that any other unfavorable circumstances appearing from the evidence occurred in the interval, so that the defendants would be in a worse condition by taking back the stock at the time of the tender than they would have been if the stock had been previously tendered, or tendered at the time the information was given; then your verdict must be for the defendants."

The verdict was for the defendants.

The plaintiffs took out a writ of error. They assigned fourteen errors. The eleventh was the answer to the defendants' fourth point; the fourteenth was the portion of the charge given above.

S. S. HOLLINGSWORTH, with whom was G. W. BIDDLE, for plaintiffs in error. The seller having by his fraud put the buyer in possession of the stock, can not complain of the delay of tender of the goods before suing for the purchase money: *Blake v. Mowatt*, 21 Beavan, 603. Where the rights of third parties have not intervened, the right to rescind can be lost only by confirmation: *Kerr on Frauds*, 235 *et seq.* and notes; *Negley v. Lindsay*, 17 P. F. Smith, 217. The delay might be explained by other facts, and the question was therefore for the jury: *Rowe v. Osborne*, 1 Starkie, 112; *Lawrence v. Knowles*, 5 Bingh. N. C. 399; *Charnley v. Dulles*, 8 W. & S. 353.

R. P. WHITE, for defendants in error. The question of reasonable time was one of law: *Atwood v. Clark*, 2 Greenleaf, 249. The rescission must be in a reasonable time: *Dows v. Smith*, 32 Vermont, 6. Such time is the earliest moment after discovering the fraud: *Weed v. Page*, 7 Wisc. 513; *Kingsley v. Wallis*, 14 Maine, 57; *Masson v. Bovet*, 1 Denio, 74; *Howe v. Huntingdon*, 15 Maine, 350; *Hill v. Hobart*, 16 Id. 168; *Campbell v. Fleming*, 1 A. & E. 40; *Ayers v. Mitchell*, 3 Shaw & McLean, 683; *Hoolbrook v. Burt*, 22 Pick. 546; *Clark v. Ascham*, 1 Ellis, B. & Ellis, 148.

The opinion of the court was delivered May 17, 1873, by WILLIAMS, J.

The only question worthy of consideration in this case is presented by the 14th assignment. The action was brought to recover the price paid for certain oil stocks which the plaintiffs alleged that they had been induced to purchase upon the fraudulent representations of the defendants, as to the cost of the land; and a recovery was sought to be had on the footing of the plaintiffs' rescission of the contract and a tender of the stocks to the defendants before bringing the action. The evidence shows that the plaintiffs bought the stocks in April, 1864; that they were informed by the defendants, in October or November, 1865, of the price paid for the lands; and that on the 2d of March, 1866, they tendered the stocks to the defendants and demanded back the money they had paid for them. Between the discovery of the alleged fraud and the tender of the stocks the assets of the company had been exhausted in boring unsuccessfully for oil, and the stocks had consequently depreciated in price. The court charged the jury that if they found that the plaintiffs were informed of the price of the lands by Mr. Wise in October, or early in November, 1865; that the plaintiffs did not offer to return to the defendants the stocks in question for one or more months after such information was given (the date is given, the evidence is March 2d, 1866); that the price of the stocks had fallen between the time of the receipt of the information and the time of the tender, or that any other unfavorable circumstances appearing from the evidence occurred in the interval, so that the defendants would be in a worse condition by taking back the stocks at the time of the tender, than they would have been if the stocks had been previously tendered at the time the information was given, then their verdict must be for the defendants. The objection made to the charge is, that the mere delay in making the tender, after discovery of the fraud, is not in itself a defense to the action; and whether it is such as to amount to a confirmation of the sale or a loss of a right to rescind it, is a question of fact for the jury.

If the defendants were guilty of the alleged fraud, the plaintiffs, on discovering it, had the undoubted right to rescind the contract, and upon a tender of the stocks, to demand back the price paid for them. But it was their duty to do it within a reasonable time. They were not at liberty to await

the result of the experiments the companies were making to obtain oil, and to rescind the contract after their efforts had proved to be fruitless. If they intended to rescind the contract it was their duty to act promptly and to return or tender the stocks at the earliest convenient moment after discovering the fraud. If they unduly delayed to return them and demand back the price, they affirmed the validity of the contract: *Pearsoll v. Chapin*, 8 Wright, 9; *Negley v. Lindsay*, 17 P. F. Smith, 217. What is reasonable time or undue delay, when the facts are not disputed, is, as is well settled, a question of law to be determined by the court: *Quam longum esse debet non definitur in jure sed pendet ex discretione judiciorum*: 1 Tho. Co. Litt. 644 (52 b).

Here the delay was for four months, and no evidence was given to explain or excuse it. Under the circumstances we have no hesitation in saying that it was unreasonable. The inference is pregnant that if, in the meantime, oil had been found in large quantities, there would have been no rescission of the contract or offer to return the stocks. The plaintiffs could not take the chance of the speculation, and at the same time repudiate the contract if it turned out to be a losing bargain. Besides, the instruction complained of was not predicated of the mere fact of the plaintiffs' delay in offering to return the stocks, but of the delay coupled with the fact that the price of the stocks had fallen in the interval between the discovery of the alleged fraud and the date of the tender. The verdict of the jury establishes both of these facts, and we are clearly of the opinion that they are sufficient to bar the plaintiffs' right to rescind the contract. There was, then, no error in the instructions of the court, and they were as favorable to the plaintiffs as they had any right to ask or expect.

There is nothing in the other assignments requiring special notice. The evidence complained of had more or less bearing upon the question in issue, and there was no error in its admission that calls for a reversal of the judgment.

Judgment affirmed.

ARTHUR V. GRISWOLD ET AL.

(55 New York, 400. Court of Appeals, 1874.)

¹ **Personal liability of directors.** Directors do not become personally liable for the fraud and misrepresentations of the active managers of a corporation from the mere fact of their holding such office in the company. Knowledge of or participation in the guilty act must be brought home to the person charged.

No personal responsibility for fraud of associates. The fact, therefore, that a defendant's name was published as trustee, and stock issued to him, do not make him responsible for a fraud carried out by other trustees and agents of the corporation.

Misrepresentations by corporate agent do not bind or affect the officers of the corporation in their individual capacity, so as to impose liability upon them in an action where they are sued personally.

False representations must be inducing cause. False representations, such as make corporate officers personally liable to a person advancing money on them, must not only be false to the knowledge of the parties making them, but must be the inducing cause to the person parting with his property.

² **Misjoinder—Sundry counts—Facts of the case.** Plaintiff sued five persons, all trustees of the corporation; one of the two counts on which he went to the jury was based upon alleged fraudulent representations by which plaintiff was induced to make loans to the company; the other count was upon the statute making officers personally liable for making false reports. The evidence would have justified a verdict against four of the defendants who had signed the report, but the fifth was not liable on that count, because he had not signed the report, and was not liable under the other evidence upon the first count. *Held*, that a new trial must be had as to all the defendants.

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict and affirming an order denying a motion for a new trial.

The first count of the complaint in this action was for fraud. It alleges that plaintiff was induced by false and fraudulent representations upon the part of the defendants, trustees and stockholders of the Iron Mountains Company of Lake Champlain, a mining company organized under the general laws (Chap. 40, Laws of 1848, and amendments), by which representations he was induced to lend said company the sum of \$45,000.

¹ *Wakeman v. Dalley*, 51 N. Y. 27; 10 Am. R. 551.

² *Freeland v. McCullough*, 43 Am. Dec. 694, note.

The fifth count of the complaint alleged that defendants made, filed and published a report, as required by said statute, in January, 1870, which was false in a material representation in stating that the capital stock of the company had been paid up in full, when they knew well that no part of the same had been paid * * * except in lands of little or no value. Proof was given upon the trial of false representations upon the part of one Richard Remington, an agent of the corporation; this was received under objection. A printed prospectus containing alleged false representations, purporting to have been issued by the company, was also given in evidence. The facts in regard to the negotiations for the loan, and the particular representations upon which plaintiff relied in making the same, are set forth in the opinion. The report set forth in the fifth count was not signed by defendant, Corning; it was shown to be false as alleged. At the close of plaintiff's case, defendants jointly and severally moved for a nonsuit. The court held in effect that there was sufficient evidence to go to the jury under the first and fifth counts; that plaintiff was not entitled to recover under the others.

At the close of the evidence a motion for nonsuit was made on behalf of the defendant, Corning. The court decided that he was not liable under the fifth count, but that the question as to his liability under the first must go to the jury, as his name was published as a trustee, and a certificate of stock was issued to him. The court charged the jury that it ruled as matter of law that the plaintiff was entitled to a verdict against the defendants, George M. Wheeler, John A. Griswold and Chester Griswold, for the amount of his claim, under the fifth count; that if they found the defendants had assented to the making and circulation of representations, known by them to be false and fraudulent, then they would find a verdict against all the defendants for the amount of plaintiff's claim; but if they found no fraud on the part of the defendants in these representations, then their verdict should be in favor of Mr. Corning and against the other three defendants, for the amount of his claim. The counsel for the defendants excepted to the submission to the jury of the question as to the liability of Mr. Corning, and also as to each of the other defendants.

The jury rendered a verdict against all the defendants for the amount of plaintiff's claim with interest.

E. W. STOUGHTON, WM. C. HOLBROOK and AMASA J. PARKER,
for the appellants.

A. C. HAND and SAMUEL HAND, for the respondents.

CHURCH, Ch. J.

The first question proper to consider is whether it was error to refuse a nonsuit as to the defendant Corning. His name was not appended to the report, which it is claimed contained false statements, and of course he is not liable on that account.

The only ground of action claimed against him is that set forth in the first count of the complaint, which is in effect that the plaintiff was induced to loan to The Iron Mountains Company, of which the defendants were directors, \$45,000 by false and fraudulent representations. It is alleged that the creation of the company was a fraudulent scheme entered into by the defendants for the purpose of deceiving the public; that property of comparatively insignificant value, transferred by some of the defendants, was represented by a capital of \$2,000,000; that the defendants were directors of the company, and issued a prospectus containing exaggerated and false statements of the resources of the company, and especially of the value of the mines and the quantity and quality of the iron ores contained therein, and the expense of working the same, and the profits to be realized therefrom.

To maintain an action for obtaining money or property by fraudulent representations, it must be shown that the person charged made the representations, that they were false to his knowledge, and that the representations were relied upon, and were the inducing cause for parting with the property. There is a significant weakness in the plaintiff's case to establish the first branch of the rule of liability against the defendant Corning. He had no interest in the property transferred to the company, and did not participate in its organization. It does not appear that he ever attended a meeting of the directors, or that he was ever in Essex county, where the property is located, or in the office in New York where the finan-

cial business was transacted, and, as to the prospectus, which contains the principal alleged false representations, it does not appear that he ever saw it or knew of its existence. The only evidence against him was that he was named a director, and 100 shares of stock were issued in his name on the books of the company, the certificates of which were mailed to him. But for the inference which may result from the admission in his answer that he was a director, there would be no evidence that he knew that he occupied that position. We think the evidence was insufficient to maintain a charge of fraud.

The mere fact of being a director and stockholder is not *per se* sufficient to hold a party liable for the frauds and misrepresentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged: 51 N. Y. 27. The pamphlet or prospectus was, in fact, printed before the organization of the company, and was mainly prepared by one Remington, who was the active promoter and manager of the company; but that Mr. Corning had any connection with it or knowledge of its existence, is not shown.

Again, there is no evidence that he knew that any of the statements contained in the pamphlet were false. If he knew of them they might have deceived him, for aught that appears, as well as the plaintiff. The plaintiff, as he swears, loaned his money upon certain statements of Remington, and upon faith in the names mentioned as directors, but he made the loan to the company and not to the directors. He had no right to rely upon their pecuniary responsibility, from the fact of being directors. No such responsibility attaches to the office. It is only when a director lends his name and influence to promote a fraud upon the community, or is guilty of some violation of law, or other mismanagement, that he is personally liable. When this is shown, he should be held to a strict rule of accountability. None of these things are shown against Mr. Corning.

The learned judge submitted the case as to him solely because "his name was published as a trustee, and a certificate of stock was issued to him." We do not think this sufficient to authorize a verdict based upon fraudulent representations.

If the defendants had confederated together to create a fraudulent corporation, the use of their names as directors by their consent, to give it credit with the public, would have presented a different question; but, although alleged, this charge was not relied upon, and the case was submitted upon the representations contained in the prospectus.

As to the other defendants there is more difficulty. The evidence was sufficient against them to go to the jury upon the fraud. We must assume that the verdict was rendered upon the first count against all the defendants, although the court ruled, as matter of law, that the other defendants were liable under the fifth count of the complaint, which was to enforce the liability created by the fifteenth section of the act of 1848, as amended by the second section of the act of 1853, upon the ground that material statements in the report of 1870 were false. The court charged the jury, in effect, that if they found the fraud, to render a verdict against all the defendants; if not, to render a verdict in favor of the defendant Corning, and against the other defendants, under the fifth count; and the jury found against all under the first count, and the rulings at the trial are therefore brought in review as to the other defendants.

The two principal errors claimed on the trial are, first, that illegal evidence was admitted; and second, that it does not appear that the plaintiff relied upon any representations for which the defendants are responsible. The evidence is quite voluminous, and is made up largely of the representations and statements of Remington, who, as before stated, was the chief manager of the company. These statements and representations were incompetent as evidence against the defendants in this action. He was the agent of the company, but was not their agent as individuals, and had no power to bind them by any statements he might make (7 Paige, 120), much less for false and fraudulent statements.

It is true that the judge told the jury in his charge that the defendants were not liable for his statements to which they were not privy; but this did not remove the influence which the evidence must have had upon the minds of the jury. The case was tried upon the theory that these statements were competent, not only those made to the plaintiff, but to other

persons, about the time of the transaction; and the remark of the judge was qualified to statements to which the defendants were privy, and did not specify which of the numerous statements came within the qualification and which did not.

This evidence constituted, apparently, the most important given, and must have made a serious impression, which the remark of the judge in his charge could not eradicate. Within the principal decided in 19 New York, 299, this error was not obviated.

The second ground of error is also a serious one, and was involved in the motion for a nonsuit made on behalf of all the defendants. The representations must not only be made by the party charged and be false to his knowledge, but they must be relied upon, and be the inducing cause of parting with the property. The plaintiff was a witness in his own behalf, and stated that the loan was applied for by one Schubarth, a friend of his, who desired to negotiate the loan to enable him to obtain a prominent position in the company; and he presented a letter addressed to himself from Remington, giving a somewhat glowing account of the prospects of the company, and stating the securities, etc., which would be furnished for the loan. He then testified: "Upon looking over the statement of Mr. Remington, and at that book with the names attached to it (the prospectus), I thought well of it, and Mr. Schubarth said to me it would give him position in the company. I felt friendly to him, and I said I would make inquiry the next day, and give him an answer." He did consult with a friend about it, and then said: "Upon the fact of such individuals being connected with the directory, I told Mr. Schubarth, I would make the loan." It seems, however, that he desired to know how much stock the directors owned, and Schubarth procured from Remington another letter containing the information. The plaintiff then testified: "Upon receipt of that letter I felt satisfied, and said to Schubarth that I would make the loan, and that he could make what arrangements he thought proper. He told me it would put him in a respectable position with the company." When he went with his attorney to consummate the loan, Remington made some other representations about the quality of the ores, and showed specimens of iron made from it, and

exhibited a topographical survey of the mines. This was the substance of all that took place prior to making the first loan of \$35,000. The plaintiff was then asked, "Would you have made the first loan which you made to the Iron Mountains Company, except for the representations that you have stated were made to you?" To which he answered, "Never." Upon this evidence was the jury authorized to find that the plaintiff relied upon and parted with his money upon the faith of the representations contained in the book, or prospectus, assuming that the defendants were responsible for them? The plaintiff does not say that he read the statements in the book, nor that he relied upon any contained therein. The only mention of the book in his evidence is that, after looking over Remington's statement and at the book with the names attached, he thought well of it; but that the contents of the book did not seriously impress his mind is evident from his next statement, that upon the fact that such names were connected with the directory, he told Schubarth that he would make the loan, and upon the receipt of Remington's next statement, he felt satisfied, and unqualifiedly agreed to make it; and the only other representations were those of Remington about the time the loan was consummated. When he said he would not have made the loan but for the representations made to him, it would be a strained and unnatural construction of the evidence to say that he referred to the statements in the book. Collating all that the plaintiff said, the natural, if not the necessary inference is that he was induced to make the first loan partly to aid his friend Schubarth, partly from the well-known character of the directors, but mainly from the representations of Remington, to say nothing of the prospect of future profits from the stock and bonds transferred to him; but it is difficult to infer that the statements in the book were either known to him or were influential in inducing him to make the loan.

It can not be claimed that the plaintiff was induced to believe that anything like \$2,000,000 had actually been paid in as capital, as the second letter of Remington, upon the receipt of which he was satisfied to loan the money, distinctly stated that but \$250,000 had been paid for all the property, and about \$100,000 for buildings and machinery; and although this statement was

probably an exaggeration, it repelled the idea of reliance upon the large capital specified. The element of reliance upon the alleged representations necessary to sustain the action was within the power of the plaintiff, if true, to establish. If he was deceived by the representations in the prospectus, and was induced thereby to loan his money, he should have so stated. This he did not do, but did state substantially that other representations and circumstances, for which the defendants were not responsible, furnished the motive for loaning the money.

Such an action can not be sustained upon misplaced confidence induced by vague surmises. The rules of law require a reasonable degree of certainty as to each requisite necessary to constitute the cause of action, viz., representations, falsity, *scienter*, deception and injury.

The evidence that the plaintiff was deceived by the statements in the book was, to say the least, very slight; but as the errors in receiving evidence entitle the defendants to a new trial on this branch of the case, it is unnecessary to determine whether it was sufficient to justify its submission to the jury, and it is equally unnecessary to notice other exceptions taken on the trial.

It is, however, insisted by the learned counsel for the plaintiff, that if this court concurs in the opinion expressed by the judge, that the defendants (except Corning) were liable under the fifth count, judgment should be affirmed, notwithstanding the errors committed on the trial in attempting to establish a cause of action under the first count. This presents a somewhat novel question. The causes of action are entirely different. The first count is upon a common law liability for fraud and deceit; the fifth count is for a statutory penalty. In the former the injury proved is the criterion of damages, which may be much less than the amount of the debt, unless a case of exemplary damages is shown, when the recovery may be much more than the debt; while in the latter no actual damages need be shown, the recovery is for the amount of the debt as a penalty, no more and no less.

It is urged by the defendants that the judgment, if affirmed, would be based upon no verdict, but would be in effect an original judgment in this court upon a new cause of action.

This court is authorized to reverse, affirm or modify the judgment appealed from, as to any or all the parties (Code, § 330): but does that authorize the court to reverse the judgment as to all the defendants, grant a new trial as to one, and order judgment against the other, for a cause of action which the jury did not pass upon, although they might have done so? The tendency of courts is to disregard mere form and reach the substance; and it is a general rule that errors or mistakes upon the trial will not entitle a party to a new trial, if, upon the undisputed facts, the plaintiff is entitled to judgment as matter of law.

Although the causes of action were different, they are to be deemed properly united, and they relate to the same general transaction. They both sound in tort; and upon the assumption that, as matter of law, the plaintiff was entitled to judgment against the three defendants, and the court below should have so directed, this court may perhaps affirm the judgment, and regard the errors committed as immaterial. But my associates think otherwise, and are of opinion that the questions arising under the fifth count are not before this court upon this appeal. It follows that there must be a new trial as to all the defendants.

ALLEN, FOLGER, RAPALLO and ANDREWS, JJ., concur for reversal and new trial as to all the defendants.

GROVER, J., concurs in reversal as to Corning, but dissents as to the other defendants.

Judgment reversed.

DAVIDSON V. JORDAN.

(47 California, 351. Supreme Court, 1874.)

¹ **Hearsay representations of value.** Representations of the value of a mine, made by vendor upon hearsay, and known by vendee to be hearsay, can not be said to be false or fraudulent, unless the vendor knew, or had reason to believe them to be untrue.

Defense to note. Such hearsay representations, *held*, no defense to purchase money note.

¹ *Cooper v. Lovering*, 6 M. R. 662.

Appeal from the District Court, Fourth Judicial District,
City and County of San Francisco.

Action brought on the following promissory note:

"SAN FRANCISCO, July 1, 1869.

"On or before the 1st day of April, A. D. 1870, without
grace, for value received, I promise to pay to the order of my-
self, twenty-five hundred dollars, in United States gold coin,
with interest from date till paid, at the rate of one per cent.
per month—interest payable monthly.

"D. JORDAN."

The note was given in purchase of an interest in the "Stir-
ling Mine," in Arizona Territory. The defendant recovered
judgment in the court below, and the plaintiff appealed.

The other facts are stated in the opinion.

GEORGE & LOUGHBOROUGH, for appellant.

The defendant should have shown by his answer and evi-
dence that he had the right to rely upon Frank's representa-
tions; that he did in fact rely upon them; that he placed a
known confidence in them; that they were not a mere ex-
pression of opinion or information; that he was misled to his
injury; that his loss was not attributable to his own folly;
that he was guilty of no laches, but promptly notified Frank
of his intention to rescind the contract, and either that the
stock was worthless, or that he offered to transfer it to Frank:
Smith v. Richards, 13 Peters, 26; *Gifford v. Carvill*, 29 Cal.
589; *Fratt v. Fiske*, 17 Cal. 380; 2 Parsons' Con. 767 *et seq.*;
1 Story's Eq., § 195 *et seq.*; 1 Story's Con., § 497 *et seq.*

PARKEE & ROCHE, for respondent.

By the Court, RHODES, J.

The defense relied upon to defeat a recovery upon the
promissory note in suit, is the alleged false and fraudulent
representations of Frank, the plaintiff's assignor. It appears
from the testimony of the defendant, that Frank, in repre-
senting the value of the mine, the amount and value of the
ore extracted and on hand, the supply of water and abundance

of wood for the working of the mine, and other matters affecting the value of the mine, spoke upon information received from other persons; that he gave the defendant the names of the persons who had communicated the information to him, and that those persons, in conversation with the defendant, corroborated all the statements made by Frank. Frank did not profess to have seen the mine, or to have any personal knowledge of its value, or of any of the matters in respect to which the false representations are alleged to have been made, but he merely communicated the information he had received from others, and so stated to the defendant. Representations made in that manner can not be said to be false or fraudulent unless Frank knew, or had reason to believe them to be untrue, and there is no evidence in the case inculcating him in that respect.

This view of the case renders it unnecessary to consider the other points presented by counsel.

Judgment and order reversed, and cause remanded for new trial. Remittitur forthwith.

¹LAW V. GRANT.

(37 Wisconsin, 548. Supreme Court, 1875.)

Fraud of agent unknown to principal. If an agent effect a sale by false representations or other fraud, which false representations or fraud are unknown to his principal, the legal *status* of the latter is just the same as if the false representations or fraud had been made or done by himself.

False representations made by stranger. A vendor making a sale induced by the false representations of a third party to the knowledge of the vendor, is responsible for the fraud, although the party making the false representations was not his agent; but where the sale is made without the vendor's knowledge of the fraudulent representations having been made, the consequences can not be charged to the vendor, and the sale will stand.

Idem. The fact that false representations made by a stranger induced the sale, the stranger having no motive in the transaction, unless he was to be paid out of the proceeds, might induce a presumption of agency; but such presumption can not be indulged if the conduct of such stranger can be accounted for on an hypothesis consistent with the vendor's innocence.

¹ *Grant v. Law*, 3 M. R. 80.

Facts of the case—Purchase advised by spiritual medium and witch-hazel wizard. Plaintiff sold defendant land for \$40,000, of which \$25,000 was secured by mortgage. The tract was worth about one third the purchase money. Defendant had been induced to purchase upon extravagant assurances of the existence of mineral, although after much expenditure no mineral at all was found to exist on the land. These representations were made by a party who professed to be able to detect the presence of mineral by the "impressions produced by passing over the place," and a spiritual medium had advised the purchase. The vendor, from the evidence, appeared to have known of the influences at work upon the purchaser, and to have taken advantage of them to ask an extravagant price for the land, but aside from this no fraud was brought home to the plaintiff. In suit to foreclose the mortgage it was *held*, that these facts did not constitute a defense.

¹ **Jury finding in equity case.** The verdict of a jury in equitable actions is but advisory; the Court of Appeal reviews the whole evidence, and the instructions to the jury are immaterial.

Appeal from the Circuit Court for La Fayette County.


Action to foreclose a mortgage. Defense, fraud in inducing the plaintiff to contract the debt which it was given to secure.

In December, 1867, the defendant purchased of the plaintiff a tract containing 400 acres of land in La Fayette county, and agreed to pay therefor \$100 per acre, or \$40,000 for the whole tract. The defendant paid the plaintiff, in cash, at the time of such purchase and on account thereof, \$15,000, and gave his five promissory notes for \$5,000 each, and ten per cent. interest for the residue of the price. He also executed to the plaintiff a mortgage on the lands so purchased, to secure the payment of such notes. Three months later the defendant paid two of the notes, the other three notes remaining unpaid. This action was brought in 1873, to foreclose such mortgage.

The complaint is in the usual form. The answer is to the effect that the land was only worth \$32.50 per acre, or \$13,000 for the whole tract, at the time the defendant purchased it, and that he was induced to make the purchase at \$100 per acre by certain false and fraudulent representations made to him by the plaintiff and his nephew and agent, one Richard S. Law; that the defendant, who resided in Mobile, Alabama, desired to purchase a tract of land in the southwestern portion of this

¹ *McGan v. O'Neil*, 5 Colo. 58.

State, proved to contain lead ore, for the purpose of mining thereon, and for no other purpose; and that Richard S. Law, knowing that fact, and acting in the matter as the agent of the plaintiff, represented to one John McDougall of Chicago, "the agent, adviser and friend of the defendant," and requested McDougall to communicate such representations to the defendant, that (quoting from the answer) "the real estate described in the complaint was, and had been proven to be, first rate lead mining land, and that there was a large vein of mineral lead ore which had been discovered upon said land, at or near a large spring of water thereon, and at a depth of about twenty feet from the surface of the ground, and that said vein of mineral would produce, and there could be worked therefrom, lead ore and mineral of the value of five thousand dollars each and every month, and that said vein of mineral could be opened so as to produce mineral at the rate aforesaid within thirty days from the commencement of mining operations upon said land; that fine specimens of lead ore were constantly being thrown out by the water in said spring, which gushed out from twenty feet below the surface of said land, to the surface, which mineral came from the aforesaid spring; that the said R. S. Law, to prove the existence of said vein of lead ore, had heretofore, near the said spring of water, with an artesian well drill or borer, drilled or bored a hole in the rock, and had bored into and struck a fine drift or sheet of lead ore mineral; that the said Richard S. Law had for a long time been of the opinion that this tract of land was valuable lead mineral land, and that, by boring therein as aforesaid, he had verified his former opinion, and at that time knew that said vein of mineral was there, and that a valuable mine could easily be developed thereon"; that believing such representations to be true, McDougall immediately wrote to the defendant at Mobile, communicating the same to him; and that the defendant, upon the receipt of the communication from McDougall, also believed such representations and, relying implicitly upon them, came to Wisconsin at once and made the purchase. The answer negatives the truth of such representations and of other alleged false and fraudulent statements made by Richard S. Law to McDougall, and repeated in the letter of the latter to the defendant. The proofs show



that this letter was submitted by McDougall to Richard S. Law, before it was forwarded, and was approved by him. The letter is of sufficient importance in the case to justify its insertion here at length. It is as follows:

"Revere House, Chicago, December 4. Bro. Grant—Dear Sir: Our friend Mr. Law has returned with reports of the 400 acre tract of which I wrote you. It is a fine prairie farm, nearly all in cultivation, with good improvements, good dwelling and fine orchard, fine fence timber three miles off, within five miles each of Shullsburg and Apple Creek railroad station. The projected railroad goes within half a mile of it, and the station will be only one mile off. The farm is leased for two years from 1st April next, until which time we could not obtain possession of it, but could go on and put up shanties and work the ore as fast as we pleased. Mr. Law is confident we could take out ore in thirty days from the beginning, and make it then produce \$5,000 worth monthly upon the vein twenty feet from the surface; that the yield will refund an advance in a few months, and furnish capital to run the main level which we would begin. Fox regarded it as the richest mine in the country, and tried to arrange to get it for himself and Story, but Law had secured the refusal. There is a spring yielding six barrels of water an hour, gushing out twenty feet from the surface, and throwing out fine specimens of lead ore. Fox went over it, and pointed out a place where there was a rich deposit. Mr. Law went to the trouble of boring there, and opened into an opening that struck the spring's vein and a splendid drift. He had the promise of the land at \$100 per acre, but after he bored the owner was disposed to advance price, and would to any one else. Mr. Law had thought he could get it lower, but can not now. His price and terms are \$100 per acre, \$40,000 in fee simple, the lessee to retain possession of the farm for the two years at \$50, or \$20,000 for the whole mineral, he retaining the surface of the farm. Terms in either case \$15,000 down cash, and the remainder (whether it be \$5,000 or \$20,000) in annual payments of \$5,000 each, with ten per cent. interest from date, he giving us a fee simple title at once, if we agree upon taking surface as well as lead, at \$40,000.

"In this case we will have 400 acres for \$40,000, instead of 200 acres for \$44,000, better improved and in a better location,

that makes the land more convenient and valuable, and plenty of time to pay; and then Mr. Law thinks that returns in thirty days after beginning will be double that of the \$44,000 mine, paying as we go; that a small engine and pump, both costing \$2,500, will lift all the water of the ground till we get an adat (adit), which adat, Fox says, will, within a quarter of a mile, tap a rich ridge, and at one half drain generally. So certain of Mr. Law's facts am I, that I have not gone to see, waiting for you. Now, to secure this, the trade must be closed and \$15,000 paid by the 24th December; before Christmas sure. We propose you take three fifths, \$24,000, and we two fifths, \$16,000, making the \$40,000. You may, perhaps, remember that in going to Apple Creek station from Shullsburg, we came to a lane that crossed our road at right angles, and turned suddenly to the left; well, it is just before we get to that point, and off a mile to the left, that lies this 400 acre tract of beautiful rolling prairie, with ridges or ribs running through it like on the \$44,000 tract. My only fear was of the too great abundance of water in the spring at twenty feet from surface. But Mr. Law regards it as a recommendation, as showing the enemy (if an enemy), in front and in hand, regarding the spring not only as a useful drain and so much water as desirable if lowered into the adat, but he regards it (and so does Fox) as the best evidence of large and open caves, and rich deposits through which it runs. I suppose it is so, but a small engine and a good pump will soon displace it, so near the surface as it is. Now, sir, I advise that you come up at once and choose between the two places, or as soon as you can, and by all means writing at once your views, if the facts on your coming bear out this report. If you conclude to choose this last named place upon coming (if it is as we think), perhaps your writing so, and that you will be here by the 20th inst., will answer so that it can be conditionally closed. The Silverthorne mine is doing well. As in the other trade, we would expect you to advance now the \$15,000 cash as you propose to do, and have all the benefit in the way of interest, etc. In answer please address immediately, Richard S. Law, both to care of Revere House here, and at Shullsburg, La Fayette county, Wisconsin, for fear it miss him.

"Yours very truly, etc.,

"JNO. McDOUGALL.

"I may reach N. O. before you start, if not before the 15th inst., but don't wait for me. I'll return here soon. This is my address here at the Revere House."

It may be stated here, by way of explanation, that Fox, who is named in the above letter, is a person who is reputed to possess the power or faculty of detecting mineral in the earth by walking upon the surface above where the same is deposited.

The answer further alleges, that after the purchase, the defendant, at an expense of several thousand dollars, fully tested the land for mineral; and such tests demonstrated that it does not contain mineral; that thereupon the defendant tendered the plaintiff a conveyance of the land, duly executed, and demanded the \$25,000 which he had paid on account of the purchase; and that the plaintiff refused to accept the conveyance or refund the money. The defendant brought an action against the plaintiff to rescind the contract of purchase and sale of the land, for fraud, and to recover what he had paid on account of it, and obtained judgment in the action, although not in accordance with the demand for relief. On appeal, this court reversed the judgment, but did not determine any of the questions involved in the present case: 29 Wis. 99. It was stated on the argument that such action had been discontinued.

The answer also contains a counterclaim for the amount paid on account of the purchase and the cost of testing the land for mineral, over and above the amount due on the notes which the mortgage sought to be foreclosed was given to secure. The court found that such excess was \$34,900. But, at the close of the trial, the defendant waived the excess of such counterclaim over and above the amount due on the notes and mortgage. The testimony is sufficiently stated in the opinion. Certain questions of fact were submitted to a jury, and they found, among other matters not material to the case on this appeal, as follows: 1. That the plaintiff induced the defendant to purchase the mortgaged premises by reason of the false and fraudulent representations alleged in the answer. 2. That the value of the land, at the time the defendant purchased it, was \$30 per acre. 3. That the land is not valuable for mineral purposes. The circuit court approved and con-

firmed the finding of the jury, and in addition, or subsidiary thereto, found the following facts: "The representations made by R. S. Law unto the defendant as to the land purchased, made previous to and at the time of the sale, were so made by the said R. S. Law for and in behalf of the plaintiff; and in the negotiation of such sale, R. S. Law acted wholly for and in the interest of the plaintiff, which the plaintiff then well knew, or, if he had no positive knowledge on the subject, all the facts and circumstances attending the transaction should and must have satisfied any reasonable man that the said R. S. Law was so acting wholly for the plaintiff. All pretenses made by R. S. Law that he desired to become a co-purchaser of such real estate with the defendant and McDougall were false, and were intended by him to mislead the defendant by inducing him to believe more implicitly the representations said R. S. Law might make, he (the defendant) believing his and the said R. S. Law's interests in the matter were identical * * *.

"Within a reasonable time after the defendant discovered and had knowledge that the representations made to him by the said R. S. Law for the plaintiff, as aforesaid, as to mineral discoveries having been made upon said land, and as to the mineral qualities of said land, were false and were fraudulently made, to wit, on the 19th day of May, 1869, the defendant informed and made known to the plaintiff that he had been induced by fraudulent means, and the fraudulent and false statements of said R. S. Law, made, as aforesaid, for and in the interest of the plaintiff, to purchase said real estate at the price aforesaid, and then tendered to said plaintiff a good and sufficient deed of conveyance of the lands described in the complaint, executed by said defendant to the plaintiff, and demanded that the plaintiff take the said conveyance and refund to the defendant the sum of \$25,000, paid by him of the purchase price of said land, and also that the plaintiff surrender to the defendant the three promissory notes sued on in this action, all of which the plaintiff then and there refused to do. Since said offered rescission of said contract by the defendant, and knowledge to the plaintiff of the fraudulent conduct of said R. S. Law in the plaintiff's behalf in making such sale, the plaintiff has

constantly claimed, and now claims, the full benefit of the contract of sale of said land made with the defendant."

The plaintiff appealed from the judgment dismissing the complaint with costs.

WM. E. CARTER, for appellant, argued upon the facts in the case: 1. That no false representations were made by R. S. Law to Grant. 2. That R. S. Law was not the agent of the plaintiff. 3. That the plaintiff had no knowledge of the representations alleged to be fraudulent, at or before the sale. 4. That Grant did not rely upon the representations which were made, if they were made. To the point that the declarations of R. S. Law, not part of the *res gestæ*, were improperly admitted in evidence, he cited *Dunlop's Paley on Agency*, 256, 268; *Packet Co. v. Clough*, 20 Wall. 528; *Hazleton v. Union Bank*, 32 Wis. 34. And that such declarations were inadmissible on the theory of a conspiracy, 1 Greenl. Ev. § 111. Fraud is never presumed, and a court of equity will, if the facts are consistent with pure intentions, refuse to infer fraud from them: *Steele v. Kinkle*, 3 Ala. 352.

M. M. COTHREN and P. A. ORTON, for respondent, as to what constitutes fraud, cited *Story's Eq. Jur.* 184; 1 *Mad. Ch.*, 255, 256; *Waltham v. Broughton*, 2 *Atk.* 43; *Alden v. Gregory*, 2 *Eden*, 285; *Trenchard v. Wanley*, 2 *P. Wms.* 166; *Earl of Chesterfield v. Janssen*, 1 *Atk.* 351; *Broderick v. Broderick*, 1 *P. Wms.* 239. As to the presumption of fraud from inadequacy of price, they cited *Butler v. Haskell*, 1 *Dess. Ch.* 697; and as to fraud by misrepresentation, *Smith v. Mariner*, 5 *Wis.* 551; *Kelley v. Sheldon*, 8 *Id.* 258; 1 *Story's Eq. Jur.*, § 183, note 3. Insisting that the evidence showed that R. S. Law acted as agent and sustained the verdict on that theory, they contended that a more liberal rule should be applied to this case.

If an agent sells property for the principal, and the principal accepts the contract, he thereby becomes answerable for all the means adopted by the agent in making the contract, whether known by him at the time or not. This position may not stand so much on the doctrine of ratification as that the principal, having received the benefit of the agent's fraud, can not retain such benefit without being answerable for the

fraud. He, undoubtedly, when informed of the fraud, may rescind the contract, placing the other party in *statu quo*; but after such knowledge, he becomes guilty if he refuses to make restitution and insists on retaining the fruits of his agent's dishonesty: 1 Story's Eq. Jur. § 193; *Fitzsimmons v. Joslin*, 21 Vt. 140-142; *Wilson v. Fuller*, 4 Ad. & Ell. N. S. 213; *Hartopp v. Hartopp*, 21 Beavan, 259; Adams's Eq. 3 Am. Ed. 369; *Bennett v. Judson*, 21 N. Y. 238; *Elwell v. Chamberlin*, 31 Id. 619; *Low v. Conn. R. R. Co.*, 46 N. H. 284; *Morton v. Scull*, 23 Ark. 289; *Udell v. Atherton*, 7 Hurl. & Nor. (Eng. Ex.) 172; *Sharp v. New York*, 40 Barb. 256; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 133; *Paine v. Wilcox*, Id. 202, 217; *Beal v. Ins. Co.*, Id. 241. And though no agency existed, yet the vendor can not retain the fruits of the fraud of another. He may innocently take, but can not retain after knowledge of the fraud. *Huyuenin v. Baseley*, 3 Lead. Cas. in Eq. 103-125; *Whelan v. Whelan*, 3 Cow. 577. It matters not that other influences operated on the mind of the purchaser, if the controlling inducement was the fraudulent representations of R. S. Law: *Hubbard v. Briggs*, 31 N. Y. 532.

S. U. PINNEY, of counsel for respondent, also filed an argument upon the facts.

LYON, J.

The cases cited by the learned counsel for the defendant abundantly demonstrate the rule of law to be, that if Richard S. Law acted as the agent of the plaintiff in negotiating the sale of the mortgaged premises, the latter is responsible for all the means employed by his agent to effect the sale. If the agent effected it by means of false representations or fraud of any other description, although without authority from the plaintiff to do so, and although the plaintiff was entirely ignorant that he had done so, the legal status of the plaintiff is precisely the same as it would have been had he made the false representations or committed the fraudulent acts to the same end, in person.

Again, if the plaintiff knew, when he sold the premises to the defendant, that the latter was induced to make the pur-

chase by the false representations of Richard S. Law, and failed to inform him that they were false, he is in like manner responsible for the fraud although Richard S. Law was not his agent. But it is claimed (and the circuit court seems to have adopted that view) that although R. S. Law was not the agent of the plaintiff in negotiating the sale and although the plaintiff made no false representations in respect to the premises, and did not know at the time of the sale that R. S. Law had done so, still, on being informed nearly a year and a half after the sale of the fraud committed by the latter, the plaintiff could not thereafter be permitted to assert any further rights under the contract of sale, and hence is not entitled to a foreclosure of the mortgage in suit. Cases to support this doctrine were cited which, together with many others of like character, have been carefully examined and considered. But they are all cases of wills or settlements, or other voluntary conveyances not founded on valuable considerations, and hence are unlike the present case. The correct doctrine is briefly and clearly stated by the Vice-Chancellor, Sir Wm. Page Wood, in *Scholfield v. Templer*, Johns. 156. He says: "This case is brought within the broad principle that no one can avail himself of fraud. As it was held in *Huguenin v. Baseley*, 14 Ves. 273, and the other cases cited in argument, where once a fraud has been committed, not only is the person who has committed the fraud precluded from deriving any benefit from it, but every other person is so likewise, unless there has been some consideration moving from himself. Where there has been consideration moving from a third person, and he was ignorant of the fraud, there such third person stands in the ordinary condition of a purchaser without notice; but where there has been no consideration moving from himself, a third person, however innocent, can derive no sort of benefit or advantage from the transaction." (p. 162-3.)

In the present case there was a valuable consideration moving from the plaintiff, to wit, the conveyance of the mortgaged premises to the defendant; and hence, within the rules above stated, the plaintiff (being himself free from fraud) can not be held answerable for the fraud of R. S. Law, and the defendant can not successfully allege such fraud as a defense to the mortgage unless R. S. Law was the agent of the plaintiff,

or, he not being such agent, unless the plaintiff knew at the time of the sale that the defendant was making the purchase on the strength of the fraudulent representations made to him by R. S. Law.

It only remains to determine what facts were proved on the trial, and to apply the foregoing principles thereto. And it should be here observed that the action being an equitable one, the verdict of the jury on the question of fact submitted to them is merely advisory, and we must determine the case upon the weight of evidence, as all other equitable actions are determined, giving no more weight to the verdict than should be given to a finding of the same facts by the court without the intervention of a jury: *Jackman Will Case*, 26 Wis. 104; *Chapin Will Case*, 32 Id. 557. If sustained by the evidence, the verdict is not vitiated by erroneous instructions; if not so sustained, correct instructions will not save it. Hence the instructions given to the jury become quite immaterial, and it is unnecessary to review them, or to make further reference to them.

The first question of fact to be determined is, was the defendant induced to purchase the mortgaged premises at the agreed price by any false representations respecting the same made to him by R. S. Law, either directly or through his friend and adviser, McDougall? The defendant testified that he made the purchase on the strength of McDougall's letter to him of December 4th, which it will be remembered was read and approved by R. S. Law before it was forwarded to the defendant. That letter contains no positive statement that R. S. Law found mineral when he bored near the spring; but he told McDougall that he then struck a sheet of lead, and it is very evident that the letter was intended to, and did impress the defendant with the idea that the boring had disclosed the existence of mineral in the land in large quantities. Whatever ambiguity there may be in the phraseology of the letter in this respect, it was removed by the statement made by R. S. Law to the defendant when he came to Wisconsin to make the purchase, that mineral was found by the former in the hole which he bored near the spring. We have no difficulty in finding from the evidence that one of the inducements which led the defendant to make the purchase was the representations of

R. S. Law that he had found mineral in the land which indicated the presence there of a valuable mine. That this representation was false is not disputed. It is unnecessary to determine whether R. S. Law made any other fraudulent representations, or committed any other frauds to induce the defendant to purchase the land.

The next question of fact, and the most difficult one in the case is, was R. S. Law the agent of the plaintiff in negotiating a sale of the land to the defendant? If he was, it necessarily follows, as has already been stated, that the plaintiff is responsible for the false representations made by his agent. There is no positive testimony of the existence of such agency, and the plaintiff in his testimony denies it fully. One Russell, testified that the plaintiff told him that if his land was mining land, R. S. Law could sell it for \$50 an acre. He does not give the date of this conversation. The plaintiff testified that the conversation took place in 1865 or 1866, and gives a different version of it. He says, "I told Russell that R. S. Law had said to me if I could find mineral on my land, I could sell it at \$50 per acre." The plaintiff also testified as follows: "Not one dollar of this money (the purchase money) was paid to R. S. Law, directly or indirectly. There was no understanding that he was to get any of this money. I had no knowledge that he was trying to sell the land; no knowledge of any representations he made about it. I only know that he wanted to buy the land himself." It was also proved that R. S. Law paid out \$250 a day or two after the sale, and \$40 several months thereafter, but there is no competent evidence showing or tending to show, from what source he obtained these sums of money. This is all of the testimony bearing directly upon the question of agency, except that Dr. Lee, a witness for plaintiff, testified under objection, that R. S. Law told him (the plaintiff not being present) that he had negotiations pending about the sale of the place, and that he was to have all he could make over \$14,000 or \$16,000. Also, that after the sale was made, he told the witness that he was to have half of the excess of the purchase money over a certain sum. This testimony of Dr. Lee was clearly inadmissible, and must be disregarded. The rule on this subject is thus stated in *Hazleton v. The Union Bank of Columbus*,

32 Wis. 34: "The admissions or representations of an agent, while engaged in any particular transaction for his principal, made in regard to such transaction, may be received in evidence against the principal in a controversy concerning such transaction. But to be received, they must constitute a part of the *res gestæ* in the course of the agent's employment about the matter in question; they must accompany the transaction or the doing of the business, and must be within the scope of the delegated authority." (p. 48.) The alleged admissions to Dr. Lee were not made in the course of the employment (if there was an employment or agency), were not part of the *res gestæ*, and hence can not be received in evidence. But it is argued that R. S. Law had no adequate motive to deceive the defendant and mislead him into the purchase of the land at an exorbitant price, unless he was acting in the interest of the plaintiff, and pursuant to some understanding with the plaintiff that he was to be paid largely out of the proceeds of his fraud. If this proposition is true, it goes far to establish the relation of principal and agent between the plaintiff and R. S. Law. If we can find from the evidence no other reasonable hypothesis of the motives which prompted R. S. Law to perpetrate the frauds than that he was to profit by the sale in the manner claimed, we shall probably be justified in finding the proposition true. But if there is any other reasonable hypothesis sustained by the evidence, consistent with the innocence of the plaintiff—one which satisfactorily explains the conduct of R. S. Law without implicating the plaintiff in his fraud by raising the presumption of agency, it should be adopted. The proposition demands careful consideration. To discuss it, and other questions in the case, intelligently, a statement of some facts not before mentioned, which we think are established by the evidence, is necessary.

At the time the defendant purchased the mortgaged premises, and before, there was much activity, perhaps excitement, in mining operations, in the mineral regions of Wisconsin and elsewhere. Lands supposed to contain minerals were held, and some such lands in the vicinity of the mortgaged premises were sold, at prices which now seem exorbitant. Such activity or excitement was doubtless increased

by the fact that a class of people made their appearance in the mining regions, who claimed to possess the power or faculty to discover the presence of mineral in the earth by means of certain mental or physical impressions or phenomena produced upon them by passing over the place where the mineral is deposited. A notable member of this class was Fox, who is mentioned in the letter from McDougall to the defendant. Doubtless very many persons honestly believed that he possessed this faculty or power to a remarkable degree. To such persons, his assertions that mineral products existed in certain specified places, imported absolute verity. We see no reason to doubt that R. S. Law was one of these. It is in proof that he is a strong believer in spiritualism, and there was much in his conduct to show that at the time of the sale he fully believed that Fox possessed this power to discover the location of mineral deposits with unerring accuracy. It is very apparent that the defendant was strongly indoctrinated in the same belief. Substantially (although cautiously and with qualifications), he admits it in his testimony. Yet there is sufficient evidence to satisfy us that his belief in the existence of such faculty or power, and that Fox and others possessed it, was strong enough to control his actions, or at least to influence them to a considerable extent. If such belief did not blind his judgment, it certainly greatly impaired his prudence and discretion. McDougall also, to a greater or less extent, entertained the same belief.

Before the plaintiff knew the defendant or had ever heard of him, Fox went upon the mortgaged premises and pronounced them rich in mineral deposits. He pointed out to the plaintiff the precise location of those deposits. Fox and R. S. Law (and perhaps Storey) thereupon proposed to buy the land on credit, and to pay therefor \$25,000. The plaintiff declined the offer, without naming a price for the land. A day or two afterward he offered to sell to R. S. Law for \$100 per acre, \$15,000 of the purchase money to be paid at the time of the sale. R. S. Law was unable to comply with the terms, and thereupon opened negotiations with the defendant, through McDougall, to become interested with him and McDougall in making the purchase. On his way to Wisconsin to conclude the purchase, the defendant passed through New

Orleans, and there consulted a woman who professed to be a clairvoyant (and whom he had consulted on other subjects), concerning his proposed purchase. This woman seems to have favored the purchase of the Law farm rather than the \$44,000 tract mentioned in McDougall's letter. In his testimony, however, the defendant disclaims that he was influenced by what the woman said to him.

The defendant reached Shullsburg, in the vicinity of the mortgaged premises, on Saturday, December 21, 1867, and found there R. S. Law and a woman from Chicago, named Allen, who, the defendant says, was a medium. It is probable that R. S. Law procured the attendance of this woman on that occasion. A number of persons, among whom were the parties R. S. Law and Mrs. Allen, went upon the land. Mrs. Allen verified the statements of Fox by walking over the land. In answer to a question by the defendant, when the parties were near the hole which had been bored by R. S. Law near the spring, the plaintiff told him that no mineral was found in that hole. This is proved by the testimony of several witnesses, although the defendant denies any recollection of such conversation. Indeed, so thoroughly impressed was the defendant with the idea derived from McDougall's letter (but not from anything said by the plaintiff) that the plaintiff desired to withdraw his offer to sell the land at \$100 per acre, that he would not (as he testified) have paid any attention to anything the plaintiff might have said against the value of the land. He subsequently testified, however, that had he heard the plaintiff say that no mineral was found in the hole, he would have given some attention to the statement. The defendant avoided conversation with the plaintiff concerning the land; he did not exact or call for any statements from the plaintiff relative to it; neither did he require the plaintiff to verify the representations made by R. S. Law, or inform him what those representations were. Referring to a time when the negotiations were still pending, the plaintiff testified as follows: "Grant said he understood my price was \$100 per acre, and remarked that was a high price for land not proved to be mineral land. I said it was high, but it had other qualities; I had proved it was a good stock farm. Water power on it, and stone quarry. I said there was a possibility of min-

eral, from my ideas of mineral in that section of the country. I said I would not sell it for mineral land, not having proved it, and not being a miner. He said it made no difference about my not having proved it; that he believed he knew more about the land than I did. Said he bought the land on his own judgment." The above testimony, or the more material portion of it, is corroborated by other witnesses, and must be taken to be true, notwithstanding the denial thereof by the defendant. The sale was completed, the deed, notes and mortgage executed, and the \$15,000 paid, on the same day that the above transactions occurred.

Subsequently, R. S. Law went to Chicago and assisted the defendant to select a pump to be used in mining on the land. Some time afterward (but at what particular time does not appear), McDougall informed the defendant that because of losses in oil speculations, he would be unable to take an interest in the mortgaged premises. The defendant replied that if McDougall could not go into the enterprise R. S. Law could not. McDougall communicated such reply to the latter, who expressed his regret, but said there were other chances as good, and never thereafter applied to the defendant for an interest in the premises.

It is believed that the foregoing are all of the facts necessary to be considered to enable us to determine whether there is any reasonable hypothesis consistent with the innocence of the plaintiff of knowledge of the frauds perpetrated by R. S. Law on the defendant, or of such participation in the acts of R. S. Law or connection therewith as will establish the relation of principal and agent between them.

After most careful consideration of the evidence, we are impelled to the conclusion that such a hypothesis may reasonably be predicated upon it. We think there are as good reasons for believing that R. S. Law perpetrated the fraud upon the defendant for his own purposes, entirely irrespective of the plaintiff, as that he did so pursuant to an understanding with, and to advance the interests of, the plaintiff. It is a reasonable theory of the case, that R. S. Law really believed that the land contained rich deposits of mineral; that he was anxious to obtain an interest in it, and that his frauds upon the defendant were for the purpose of obtaining such interest

by inducing the defendant to become the purchaser, and not because he had any agreement with the plaintiff to share in the proceeds of the sale.

The faith of the defendant and R. S. Law in the powers of Fox, Mrs. Allen, and others of the same class, may reasonably be considered the key to the whole transaction. It may explain the conduct of R. S. Law, and the marvelous credulity and want of discretion of the defendant, without impeaching the honesty of the plaintiff. It is our unmistakable duty to accept the explanation, because it is reasonable and because it is in favor of innocence. We conclude that the proofs fail to show that R. S. Law acted as the agent of the plaintiff in negotiating the sale of the mortgaged premises to the defendant.

The remaining question to be determined is, whether the plaintiff, at the time of the sale, knew that the defendant was induced to purchase the land by the false representations of R. S. Law. This question requires no extended discussion. Much that was said in the consideration of the question of agency is applicable to it, and need not be repeated. It is sufficient to say here that the denial by the plaintiff, in his testimony, of any such knowledge or notice, has not been successfully controverted by the defendant. Aside from the mere fact that the plaintiff demanded and received what now seems to have been an exorbitant price for his land, the case seems entirely destitute of evidence tending, even remotely, to prove that the plaintiff then had any knowledge or suspicion that R. S. Law had perpetrated a fraud of any kind upon the defendant. Under all of the circumstances of the case, we are not authorized to reject the positive denial of the plaintiff.

A few observations, not pertinent to the discussion of the questions of fact above considered, but relating rather to the personal connection of the plaintiff with the contract of sale, will conclude this opinion. The plaintiff doubtless thought that R. S. Law and the defendant had extravagant notions of the value of his land; he probably knew that their valuation was based on their belief in the power of Fox and others to detect the location of mineral deposits; and he fixed a high valuation on his land in view of those facts. But it does not

appear that he did any act or spoke any word to canse or strengthen such opinion. On the contrary, he frankly told the defendant that no mineral had been found in the land, except a little piece found in the spring (and the proof is that some mineral was found in the spring), and he expressly declined to sell the land as mineral land.

It frequently happens that the market values of stocks and other kinds of property are temporarily inflated, by means of the grossest frauds, far above intrinsic values. Yet no one will claim that contracts for the sale and purchase thereof at such inflated prices, by parties not concerned in the fraud, can be successfully impeached. This seems to be a case within the same principle. The defendant was made to believe that he knew the value of the land better than did the owner. He acted upon that belief, and bought the land at an exorbitant price. His opinion was based partly upon false assertions of fact made by R. S. Law, and for which the plaintiff was in no manner responsible, but mainly, in our opinion, upon his absurd belief in the powers of Fox. Neither was the plaintiff responsible for that belief; but sold his land for the price the defendant was willing to pay for it. It turns out that the belief of defendant is unsound; that he spent his money and incurred obligations upon the strength of a false theory or doctrine, being incited thereto by the false statements before mentioned. On what principle can a court of equity relieve him from the consequences of his gross folly and want of common discretion and prudence? The question has already been answered.

In order to entitle himself to relief, we have seen that he must connect the plaintiff with the alleged fraud by showing that it was perpetrated by the plaintiff or his agent, or, if by a person not the agent of the plaintiff, that the latter had notice of the fraud at the time of the sale. The defendant has failed to prove either of these propositions, and, however reluctant we may be to do so, we must hold that he has failed to establish his counterclaim.

A new trial will be of no service to the defendant, unless he can produce additional evidence of agency or notice of the fraud, as the case may be. If he satisfies the circuit court, by affidavit or other competent proof, that on another trial he

will be able to prove a defense to the action, we think that court should grant a new trial. Otherwise, the plaintiff should have the usual judgment of foreclosure and sale.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

MORGAN V. SKIDDY ET AL.

(62 New York, 319. Court of Appeals, 1875.)

¹**Responsibility for prospectus.** A director of a corporation who knowingly issues or sanctions the circulation of a prospectus containing material misstatements is liable in damages to a party induced to purchase stock by the contents of such prospectus.

Sole inducement. The false statements relied on to sustain the action need not have been the sole inducement to the purchase.

Lode extension. The prospectus represented the Bates lode as parcel of the property of the company, when in fact the company only held a piece of property located as an extension of the Bates lode. *Held*, a material misrepresentation.

²**Fluctuations of mining property,** considered with reference to disproportion between original price of the mines and the subsequent valuation for stocking purposes.

Use of name of trustee. The mere allowance of the use of a party's name as trustee of a company whose stock afterward proves to be worthless, is not sufficient to maintain an action charging personal liability, without proof of knowledge of such fact or of any false representations.

Appeal from judgment of the General Term of the Superior Court of the City of New York, affirming a judgment in favor of the defendants, entered upon an order dismissing plaintiff's complaint on trial. (Reported below, 4 J. & S. 152.)

This was an action for fraud. The complaint, in substance, alleged that defendants, designing and intending to cheat and defraud plaintiff and others, caused a certificate to be filed of the organization of a mining corporation called the Central Mining Company of Colorado, with a nominal capital of \$1,000,000, the certificate stating that "the said capital is not

¹ *Clarke v. Dickson*, 6 M. R. 523.

² *Langdon v. Fogg*, 18 Fed. 5; *Lake Superior Co. v. Drexel*, 90 N. Y. 87.

to be owned or possessed by it in money, but is to consist of and is to be represented by the mines and other property necessary for the business of said company, to be purchased by the trustees thereof, and to be paid for by the issue of stock of said company," and did also make, issue and publish, false and deceptive pamphlets and prospectuses containing various false and fraudulent statements of facts (which were specifically set forth and which appear in the opinion) which they caused to be exhibited to plaintiff, well knowing them to be false, whereby plaintiff, relying thereon, was induced to make a purchase of the stock of said company, etc.

The facts appearing on the trial are sufficiently set forth in the opinion.

ERASTUS COOKE, for the appellant. It is no answer to this action to say that plaintiff's purchase was not made from the defendants: *Chester v. Dickerson*, 52 Barb. 349, 358; *Shotwell v. Mali*, 38 Id. 445. Defendants are responsible for the pamphlets and map: *Arent v. Squire*, 1 Daly, 347; *Scott v. Depeyster*, 1 Ed. Ch. 513, 542, 543; *Hartwell v. Root*, 19 Johns. 345; Kerr on Fraud and Mistake, 140, 141; *Smith v. Richards*, 13 Pet. 26; *Elwell v. Dodge*, 33 Barb. 336; *Howard v. Hatch*, 29 Id. 304; *Jackson v. Campbell*, 5 Wend. 575; *Chester v. Dickerson*, 52 Barb. 349; *Sage v. Sherman*, 2 Comst. 417; *Sweet v. Bradley*, 24 Barb. 549; *Hawkins v. Appleby*, 18 Wend. 185, 186; *Coster v. Bettner*, 1 Bosw. 490; *Townsend v. Bogart*, 11 Abb. 362; *Bennett v. Judson*, 21 N. Y. 238; *Craig v. Ward*, 36 Barb. 385; affirmed 3 Keyes, 387; Story on Sales, § 165; *Ainslie v. Medlycott*, 9 Ves. 21; 1 Story's Eq. § 193; *Bennett v. Judson*, 21 N. Y. 241; *Wakeman v. Dalley*, 51 Id. 34; *Meyer v. Amidon*, 45 Id. 169; *Oberlander v. Speiss*, Id. 175; *Hubbell v. Meigs*, 50 Id. 480; *Marsh v. Falker*, 40 Id. 566; *Fisher v. Mellen*, 103 Mass. 503.

JOHN S. WOODWARD, WILLIAM W. MCFARLAND, JAMES W. GERAED and HENRY WOODRUFF, for the respondents. To entitle plaintiff to go to the jury, there must have been evidence warranting them to find that guilty knowledge on the part of the defendants existed: *Marsh v. Falker*, 40 N. Y.

562; *Chester v. Comstock*, Id. 576; *Lefler v. Field*, 52 Id. 621; *Meyer v. Amidon*, 45 Id. 169; *Oberlander v. Speiss*, Id. 175; *Holdridge v. Webb*, 64 Barb. 9; *Hubbell v. Meigs*, 50 N. Y. 480; *Wakeman v. Dalley*, 51 Id. 27; *Clarke v. Dickson*, 6 C. B. (N. S.), 453; *Hubbard v. Briggs*, 31 N. Y. 518, 529; *Gerhard v. Bates*, 22 L. J. (Q. B.), 369; *Huntingford v. Mussly*, 1 F. & F. 690. The appearance of the name of any one of the defendants upon the prospectus was not sufficient to charge him, even if it appeared that he knew his name was there: *Wakeman v. Dalley*, 44 Barb. 498; 51 N. Y. 27; *Cullen v. Thompson*, 4 Mac. Q. H. of L. Cas. 441; *Moore v. Burke*, 1 F. & F. 258, 273, 277, 280; *Clarke v. Dickson*, 6 C. B. (N. S.), 453. If the issue of the stock was irregular in form, such irregularity could only create a liability in favor of creditors of the corporation: *Boynton v. Hatch*, 47 N. Y. 225. If the representations in the prospectus were false and fraudulent, they could form no ground of action unless made by one of the defendants to plaintiff and relied upon by him when the purchase was made: *Wakeman v. Dalley*, 51 N. Y. 27; *Arthur v. Griswold*, 55 Id. 400.

ANDREWS, J.

In determining whether the trial court correctly granted a nonsuit, the plaintiff is entitled to the benefit of every inference from the evidence in support of his case, which the jury, if the case had been submitted to them, would have been entitled to draw. The general facts are, that a corporation called "The Central Mining Company of Colorado" was formed on the 21st day of December, 1863, by the filing of a certificate under the general law of this State authorizing the formation of corporations for mining and other purposes. It stated that the capital stock should be \$1,000,000, divided into 50,000 shares of twenty dollars each, but that it was not to consist of money; "but it is to be represented by the mines and other property necessary for the business of the company, to be purchased by the trustees thereof, and to be paid for by the issue of stock of the company." The objects of the company were declared to be "the mining and separating of gold and other ores," and the defendants, except Ash-

more, were named as trustees for the first year. On the 20th day of January, 1864, a meeting of the board of trustees was held in the city of New York; and after it was organized by the appointment of a chairman and secretary, the defendant Gaylord, as the minutes state, "offered to the company a property in Colorado, of which a particular description was presented, to be paid for by the issue of 50,000 shares of the company's stock;" and after an examination of the papers, a motion was carried to purchase the property upon the terms proposed by Mr. Gaylord. The defendant McVickar was elected president of the company. A code of by-laws was adopted, and the meeting adjourned; and this, so far as the case shows, was the only meeting of the board of trustees which was ever held. On the twenty-second of January, the defendant Gaylord, by deed, reciting a money consideration of ten dollars, and the receipt of 50,000 shares of the stock of the company, conveyed to the company two pieces of land in Gilpin county, Colorado, one of which is described as follows: "Fourteen hundred feet on the Bates extension quartz lode, being and including claims numbers nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one and twenty-two, northeast from the discovery of said Bates extension."

Gaylord derived title to the property conveyed to the company by two deeds, one from Theodore H. Becker, embracing the property above described, dated May 5, 1860 (but in fact executed in 1863), in which the consideration was stated to be \$30,000; and one from Harvey L. Graham, embracing the other property conveyed to the company, dated January 12, 1864, reciting a consideration of \$5,000. The actual consideration paid by Gaylord for both pieces of property did not exceed \$10,000. The whole stock of the company (50,000 shares) was issued to Gaylord, January 21, 1864. On the same day he transferred to the company 2,500 shares of the stock, and to H. S. Fearing, one of the firm of Dalton & Fearing, stock brokers, 10,000 shares *in trust*, but the persons beneficially interested in the trust are not named in the transfer.

The next step was the preparation of a prospectus by the defendant Ashmore, upon the suggestion of the defendants

McVickar and Gaylord. It was promptly prepared, and was printed on or before the 23d day of January, 1864. The name of the company and of the trustees appeared upon the title-page, and it commenced by stating the fact of the organization of the company with 50,000 shares of stock, "and with a working capital of \$50,000, viz., \$25,000 in cash and \$25,000 in stock." The prospectus then sets forth as follows: "The objects of the company are to purchase and work two properties in Colorado Territory, hereinafter described, viz.: One property on North Clear Creek, as shown by the accompanying maps, at or near Black Hawk Point in Gregory Region, Gilpin county, Colorado, *embracing 1,400 feet on the celebrated Bates lode*; at this point the vein has already been explored by seven shafts, sunk at intervals of about fifty feet, and varying in depth from twenty to forty feet, exposing a vein varying from one and a half to four feet in width. Considerable quantities of ore have been taken from these openings, yielding gold equal in quantity to any yet mined from *this old and well known lode*;" and again: "The Bates lode is one of the oldest discoveries in Colorado, and has been profitably worked by many shafts, in some instances 300 feet in depth." The prospectus contains letters from various individuals giving most encouraging accounts of the Bates lode. One of them, purporting to be written to Gaylord by one B. F. Dalton, states that the writer has been in the mining region of Colorado ever since the discovery of gold in that Territory, and that the Bates lode "has proved very rich, more so than any other lode in the mountain." Another writes, that from the working of the claims by a Mr. Baxter on this lode with a small force, his "net profit is \$100 a day," and that "his property on this lode, which two months since was only valued at \$40,000, he now holds three fourths of it at \$100,000." The result of an assay of ore taken from this lode is given, showing it to be very rich in gold; and the prospectus, after describing the other property of the company, concludes: "From the foregoing statements, and from the *developments on our 1,400 feet on the Bates lode*, we are justified in saying our supply of ore will be inexhaustible, it having been proved by the experience of other companies, that the deeper the workings the richer and more productive the veins become."

The plaintiff was the first purchaser of the stock of the company. He received a letter from Mr. Dalton, of the firm of Dalton & Fearing, a trustee of the company, "calling his attention to the stock, and recommending it"; and thereupon, on the twenty-third of January, two days after the organization of the board of trustees, he went to the office of Dalton & Fearing and was shown the prospectus and map. The plaintiff, in his testimony, says: "One of the prospectuses was handed to me; I looked at it; I told Mr. Dalton I knew nothing at all about it. He says, 'It is all right,' and upon that I gave him my check for \$5,000, in payment for 500 shares at ten dollars a share." Again he says, on cross-examination: "Mr. Dalton said to me 'It is all right,' and I gave him my check. I was handed that prospectus to read, and my attention was called to the map that hung on the wall; I read the prospectus, I ran my eye over it, and afterward took it home with me, and read it over afterward; I looked through it casually before I paid; I can not tell whether I looked at the map before I completed the purchase of the stock, it was so long ago; I read the prospectus before I bought the stock; I did not read every word, though I looked more particularly to the property and the names that were in the company. I thought that was a sufficient guarantee of its being worth something. I did not think the men whose names I saw would be connected with a fraud."

The sale to the plaintiff was followed by sales through Dalton & Fearing of large amounts of stock of the company at ten dollars and upwards a share; and there was paid to Dalton and McVickar, on account of such sales, more than \$200,000. To whom the stock sold by Dalton & Fearing belonged, does not very distinctly appear; but when sales were made Dalton and McVickar furnished the certificates and received the proceeds. The corporate enterprise proved to be a failure. Something was attempted in the way of working the mine, but after a few months the business was found unprofitable and was suspended, and has never been resumed. The representations in the prospectus, on investigation, proved to be false in several particulars. Instead of the company having 1,400 feet on the celebrated "Bates lode," as therein stated, it possessed 1,400 feet on the "Bates extension quartz

lode," which was located 800 or 1,000 feet from the spur on which the "Bates lode" was, and separated therefrom by an intervening ravine, or gulch, and had not been proved to be the true extension of that vein. Mr. Bates, the discoverer of the "Bates lode," testified that there were three or four veins claimed by different owners to be "Bates extensions," and that, to his knowledge, the true continuation or extension of that vein had not been ascertained. The representations in the prospectus as to the exploration made on the land of the company were false. But two or three shafts had been sunk upon this property. Very little work had been done upon it, and the presence of valuable ores in any considerable quantities had not been discovered. The company owned no property on the "Bates lode," and the testimonials in the prospectus respecting it were misleading and deceptive; they had no reference to the property actually owned by the company, although in connection with the false description they appeared to relate to it, and must have been so understood by persons reading the prospectus who had no other knowledge upon the subject. The false statement in the prospectus related to an existing fact which materially affected the value of the shares; it was prepared for the purpose of circulation and to induce investments in the stock of the company. If the plaintiff purchased his stock relying upon the truth of the prospectus, he has a right of action for deceit against the persons who, with knowledge of the fraud and with intent to deceive, put it in circulation. The representation was made to each person comprehended within the class of persons who were designed to be influenced by the prospectus; and when a prospectus of this character has been issued no other relation or privity between the parties need be shown, except that created by the wrongful and fraudulent act of the defendants in issuing or circulating the prospectus, and the resulting injury to the plaintiff: *Clarke v. Dickson*, 6 C. B. (N. S.), 453; *Central Railroad Co. v. Kish*, Law Rep. (2 Eng. and Irish App.), 100.

It is hardly necessary to say that a director of a company who knowingly issues or sanctions the circulation of a false prospectus, containing untrue statements of material facts, the natural tendency of which is to mislead and deceive the com-

munity and to induce the public to purchase its stock, is responsible to those who are injured thereby. Mere exaggerated statements of the prospectus of a new enterprise will not subject those who make them to liability; but, as was said by the chancellor in *Central Railroad Company v. Kish*, "no material misstatement or concealment of any material fact ought to be permitted." The directors of a company are supposed to know the facts touching its condition and property, and their statements in respect to its affairs naturally attract public confidence. If they fraudulently unite in an attempt to deceive the public, and by false statements of facts to give credit and currency to its stock, it is but simple justice that they shall answer to those who have been deluded into giving confidence to them.

We agree with the General Term in their opinion that no cause of action was established against the defendants, Travers, Skiddy and Jerome. Travers was elected one of the trustees, but he never accepted the appointment or acted as trustee; and so far as appears, was in no way connected with the organization or management of the company. The defendants, Skiddy and Jerome, were present at the organization of the board of trustees and participated in the action which resulted in the purchase of the Colorado lands from the defendant, Gaylord; their interest in the company seemed to be nominal merely. They each held five shares of the stock, and so far as this case shows, they never took any part in the management or business of the company after the occasion mentioned; and neither dealt in the stock or received any of the proceeds from its sale; and they are not shown to have known of the existence of the prospectus. There is, we think, no ground upon the evidence for imputing to them any actual fraud in the transaction. They assented to the purchase from Gaylord and to give him in exchange for the land, the whole of the stock of the company. But it does not appear that they knew the value of the property. The deeds to him expressed a consideration of but \$30,000; but one of them, although actually executed in 1863 was dated in 1860, and in view of the extreme fluctuations in value of mining property between those years, it can not be assumed without proof that they knew that the real value of the property in 1864 was so

grossly disproportionate as it was to the nominal amount of the stock given in exchange for it. The enterprise was speculative, as all parties must have understood. The plaintiff, who purchased the stock at ten dollars a share, could not have supposed that the property of the company was equal in value to the par value of the stock. It may justly be said that the two trustees mentioned allowed their names and credit to be used to float what afterward turned out to be worthless stock; but this alone does not constitute actionable fraud. The defendant McVickar, stands in a different position. He was the originator and promoter of the company. The evidence warrants the inference that he had examined the title deeds held by Gaylord. He suggested the preparation of the prospectus and made the map attached to it. As soon as the prospectus was issued, he became an active seller of the stock, and received large sums as the proceeds. These facts unexplained would, we think, have justified the jury in finding that he knew the true description of the property conveyed to the company by Gaylord, and that he sanctioned the use and circulation of the prospectus with the false description contained in it. The fraudulent conduct of Gaylord was clearly established, and we think the evidence was also sufficient to require the question of fraud on the part of the defendant Ashmore, to have been submitted to the jury.

The other fact necessary to be established by the plaintiff in order to justify a recovery, viz., that he relied upon and was deceived by the false description of the property in the prospectus in purchasing the stock, is by no means clearly established. That he trusted to a considerable extent to the judgment of Dalton, and relied also upon the character of the men named as trustees, can not be doubted. But we think there is some evidence that he relied also upon the statements in the prospectus. He looked over the prospectus before purchasing, and "read it." He looked, he says, "more particularly to the property and the names that were in the company." He said to Dalton, after "looking" at the prospectus, "I know nothing at all about it," and Dalton said, "It is all right," and upon that I gave him a check for \$5,000. It was for the jury to say whether he did not, to some extent, rely upon the description of the property in the prospectus in con-

nection with the confirmation of its truth by Dalton, and the other circumstances proved. It is sufficient, in order to maintain the action, that the false statement was one, although it may not have been the sole inducement to the purchase: *Clarke v. Dickson, supra*.

I am of opinion that the case should have been submitted to the jury as to the defendants, McVickar, Gaylord and Ashmore, and that the judgment as to them should be reversed. It is only intended to decide, in this case, that upon the case made by the plaintiff the defendants named should have been put to their defense, and that the jury was the proper tribunal to pass upon the facts tending to establish their liability.

All concur, except CHURCH, Ch. J., not voting.

Judgment affirmed as to defendants, Skiddy, Travers and Jerome; and as to defendants, McVickar, Gaylord and Ashmore, reversed and new trial granted.

TUCK V. DOWNING.

(76 Illinois, 71. Supreme Court, 1875.)

Misrepresentations immaterial or not relied on. To justify a court of equity in rescinding a sale, it is not only necessary to establish the fact of misrepresentations by clear proof, but they must be upon a material matter; if upon an immaterial thing, or if the other party did not trust to it, or upon a matter of opinion or fact equally open to the inquiries of both parties, in regard to which neither could be presumed to trust the other, there is no reason for equity to grant relief on the ground of fraud.

Latitude allowed vendor. A vendor trying to sell his own property has a right to "puff" it in the most extravagant terms, the other party being at full liberty to exercise his own judgment about it.

¹ **Misrepresentation as to price paid.** The vendor of a mine represented that he had paid, or was under obligations to pay, \$40,000 for it. At the same time he exhibited a deed to himself, expressing a consideration of but \$9,000. *Held*, 1. That a false statement of the price paid is not of itself a material representation. 2. That in connection with the exhibition of the deed it could not have misled.

¹ *Holbrook v. Connor*, 60 Me. 578; 11 Am. R. 212 and note.

Purchase after inspection. On a bill to set aside a purchase of an interest in a mine in Utah, sold in Pennsylvania, on the ground of fraudulent misrepresentations as to the quality and prospects of the mine, it appeared that on the representation of the vendor a committee had been selected, who had personally examined the mine, on the report of which committee the sale was consummated. *Held*, that any extravagant representations of the vendor could only be regarded as the expression of an opinion about a matter of which the committee could judge for themselves, and that they formed no ground for setting aside the contract.

¹ **Matters of opinion.** Where the representations complained of are necessarily mere matters of opinion as to the future prospects of a mine, the rule, *caveat emptor*, applies, and the sale will not be set aside whether the vendee has or has not availed himself of an opportunity to examine the premises.

The knowledge of the agent of the vendee is as binding upon him as his own knowledge.

Variance. A party can not make out one case by his bill and another by his proof; they must correspond.

Weight of evidence. The evidence of persons not familiar with mines contrasted with that of experienced miners.

Co-tenants not partners. A mere co-tenancy does not establish a partnership so as to establish a relation of trust and confidence.

The "prospect," the inducement of purchase. Mines are bought and sold on the "prospect," not on the warranty.

Appeal from the Circuit Court of Cook County, the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was a bill of complaint in the Circuit Court of Cook County, exhibited by Jerome F. Downing against J. H. L. Tuck, George A. Childs and Octavius Prince, the scope of which was to procure a cancellation of a promissory note executed by complainant to Tuck for five thousand dollars, and which Tuck had placed in the hands of Childs & Prince, bankers at Chicago, as collateral for a loan by them to Tuck of seven hundred dollars. The principal allegations in the bill of complaint are, that Tuck, in July, 1873, came to Erie, Pennsylvania, with Lucian P. Sanger, claiming to come from Salt Lake City, in the Territory of Utah; that after they had been in Erie a short time, sojourning at the house of Irving Camp, then a resident, they tried to form a company to purchase a two thirds interest in pretended mines, veins and lodes in the West Mountain Mining District, in Salt Lake county, Utah,

¹ *Gordon v. Butler*, 105 U. S. 553.

and to facilitate their purchase, Sanger and Tuck represented to complainant and to others, that one Scribner, of Salt Lake City, owned an interest of two thirds in two mineral veins or lodes, known as "Aqua Frio" and "Black Metallic" lodes, containing six hundred feet in each, and situated in the "West Mountain Mining District" in Salt Lake county, Utah, and certain other veins known as "Green Yankee," containing thirteen hundred feet adjoining the northeast end of the "Black Metallic Vein," which interests Scribner desired to sell, and offered them for sale for forty thousand dollars; that Tuck and Sanger represented that Sanger had a deed from Scribner of this two thirds interest, which Scribner had executed to enable Sanger to give deeds to parties who might purchase, to save the trouble of procuring deeds from Salt Lake to be executed by Scribner.

Tuck, in talking very freely about the mines, and in his endeavors to sell and to induce complainant and others to form a company to purchase and work these mines, represented to complainant and others that he himself had no interest in these mines, and that his only object in coming with Sanger was as a professional attendant and a practical and experimental geologist, and as one well acquainted with mines and mining in the Territories, and therefore could speak more confidently as to these mines, and that he came to explain the geological features of the country and the character of the mines; that they represented to complainant and others that the mines were of great value, yielding rich copper ore, with more or less gold; that Sanger had purchased from Scribner one third interest therein, which he bought to hold as an investment, and that Scribner would not sell his remaining interest for less than forty thousand dollars; that on this visit nothing was effected, and the adventurers left Erie; but a short time afterward Tuck returned and again endeavored to induce complainant and others to purchase this two thirds interest, he, Tuck, having then and there a deed purporting to have been executed by Scribner to him for this two thirds interest, he representing the deed was executed to him on the condition he should go East and dispose of the same for not less than five thousand dollars a share of one twelfth, and that he had given his personal obligation to a Scribner in the sum

of forty thousand dollars, to secure Scribner out of the sales of these shares at five thousand dollars for one twelfth part thereof; that by these representations to complainant and others named in the bill of complaint, they were induced to form a company to purchase this two thirds interest; and as a further inducement to purchase, Tuck represented that no reduction in price could be obtained from Scribner; and he further represented to them that he was an experienced geologist, well acquainted with mines and mining in the Territories, and with these mines in question, by which he could speak confidently as to their value. He then represented them to be of great value, yielding rich copper ore, with more or less gold, and assured complainant if he would purchase a share, the profits immediately to result from their being worked, or within the first six months, would be large enough to enable him to pay for such share from the profits; that the mines could be depended upon for sufficient copper ore to keep one or more smelters in constant operation from the commencement, and that the profits would be large; that relying upon these representations, complainant purchased of Tuck one undivided one twelfth interest, and gave to him his promissory note for five thousand dollars, payable six months after date, upon which Tuck delivered to complainant a quitclaim deed from himself for this one twelfth interest; that Tuck disposed of other shares, to wit: to W. L. Scott one share, to I. Camp one share, to Noble two shares, and to M. R. Barr two shares, he, Tuck, pretending to divide Scribner's interest into eight shares, he selling seven shares and retaining one share to himself.

The bill then alleges that a company was thus formed in Erie to work this mine, to smelt and sell ore and copper; that it was called "The Erie Mining and Smelting Company," but was not incorporated. It is then alleged the company took possession of the mines in August, 1873, and attempted working them, but found them wholly worthless; that complainant fully relied on all the representations of Tuck, and believed them true when he made the purchase and gave his note; but they were all false and untrue, and made by Tuck to cheat and defraud complainant out of his note; that, so far from being true, Scribner gave Tuck the deed for his two thirds interest in the mines

on the understanding that he should go East and dispose of it for not less than five thousand dollars for an undivided one twelfth part; and so far from its being true that Tuck had given his personal obligation to Scribner for forty thousand dollars, he had obtained Scribner's interest for a mere nominal value and without such obligation; that the entire interest of Scribner could have been obtained for the amount of complainant's note; that Tuck well knew this at the time he made his representations; that he made them with intent to cheat complainant out of the note, he, Tuck, knowing all his representations to be untrue, and the mines to be worthless. It is then alleged, so anxious was Tuck that complainant and others should not know what he paid Scribner or what Scribner had or would ask for his interest, that when one of the persons to whom shares were sold suggested to Tuck that a letter should be written to Scribner to see if he would not take less than forty thousand dollars therefor, Tuck immediately opposed the idea, asserting it was Scribner's best terms, and he had obligated himself to pay forty thousand dollars, and Scribner would not take a cent less.

The bill then charges that, in disposing of this stock to these members of the company, he unjustly discriminated in favor of certain members, by selling to such, interests in these mines on more favorable terms than he did to complainant, to the prejudice of his rights as a member of the company, and in violation of a common understanding as to the price to be paid by each member thereof purchasing from him, Tuck, and the note was obtained by fraud.

The bill then charges that, after obtaining the note, Tuck left Erie and was not heard from until the 13th of October, 1873, when complainant received a telegram from Childs & Prince, bankers in Chicago, asking if complainant's note to Tuck was all right; to which complainant replied it was not all right, and in three or four days thereafter complainant received a letter from these bankers to the effect that his telegram did not reach them in time to prevent them advancing upon the note to Tuck seven hundred dollars, and that they held the note as collateral security therefor.

Answer under oath was waived. The prayer of the bill of complaint was, that Childs & Prince be restrained from

buying this note and from selling, or in any manner disposing of the same, except to complainant, and if they had bought it in good faith, or had advanced money on it to Tuck, that they may be decreed to deliver to complainant the note, upon payment by him of the amount advanced by them, and that complainant might be subrogated to their rights, and that they deliver up to complainant any notes of Tuck or other securities held by them from or against Tuck for this advancement, and that the note in question might be delivered up and canceled, and for further relief.

An injunction was allowed, and defendants Tuck and Childs & Prince filed their answers, the latter stating, in substance, the receipt and possession of complainant's note; that they had advanced seven hundred dollars upon it without notice of any infirmity in it, and held it as collateral security therefor. They admit having in their possession some silver mining stocks received from Tuck, and will present a list of the same when required by the court, and have no other property of Tuck.

Tuck answered the bill at length, and in detail, in which he gives his version of the transaction, admits the visit to Erie in July, 1873, where he endeavored to form a company to purchase a two thirds interest in these mines, and admits he represented to complainant and others there that one Scribner, of Salt Lake City, owned a two thirds interest in these mines, as alleged, and that he would sell this interest for forty thousand dollars, and that Sanger had a deed for that purpose; admits they spent some time in Erie; that he there represented he had no interest in the mines; that he came with Sanger as a professional attendant, he himself being a professional and practical geologist, and acquainted with mines and mining in Utah Territory, and for that reason could speak more confidently of the character and value of these mines; that they (he and Sanger) represented that the mines were valuable, yielding rich copper ore, with more or less gold and silver, and that Sanger had an interest of one third in these mines as an investment, and that Scribner would not sell his two thirds for less than forty thousand dollars. He admits they then left Erie, and that he, Tuck, returned to that place on the 1st of August, 1873, with a deed

from Scribner of his two thirds interest, and represented to complainant and the others that it was executed to him to enable him to convey that interest to others for not less than five thousand dollars for each share of an undivided twelfth part of the same; but denies that he represented to complainant or others of Erie that he had given his personal obligation to Scribner for forty thousand dollars, or other sum, as a guaranty that he would sell his interest for that sum and secure its payment by sales of shares, or otherwise, and denies making the representations to complainant or others of Erie, alleged in the bill. He admits he did state to complainant and others of Erie, that no reduction in price could be obtained of Scribner; that the mines were of the capacity and value as alleged in the bill, and that he made such representations in order that complainant and the others might be induced to examine the mines themselves, and satisfy themselves, upon such examination, of their value, preliminary to the formation of such company for working the mines; and that all the representations made by him were true in every particular, and that the representations were so understood by complainant and the others to have been made for the only purpose of inducing them to examine the mines, and thereby ascertain if it would be advisable for them to embark in the enterprise; that thereupon complainant and the others appointed a committee, consisting of M. R. Barr and Irving Camp, to proceed to the mines and examine into their capacity and value, he, Tuck, promising to accompany the committee to the mines, which he did; that the committee, when at the mines, examined them fully, and at defendant's suggestion they went to "Mammoth" and "Copperopolis" mines at East Tintic, eighty miles from Salt Lake City, to examine those mines, in order to assure themselves of the character, value and extent of the mines in question, they being of the same general character of the mines in question, and so understood by this committee at the time; that after a critical examination by the committee of these Tintic mines, they returned to Salt Lake City and again went to the mines in question and made another thorough examination of them, and took ores from the mines and had them assayed to ascertain their richness and value; and thereupon the committee expressed them-

selves to be more than satisfied with the result of their investigation, and said to defendant and others that the mines were of greater value than had been represented to them by Sanger and Tuck at Erie; that the committee, whilst at these mines, made arrangements to purchase a favorable site for the company; that shortly thereafter, the committee and defendant returned together to Erie, the committee reporting to the parties the result of their mission, and of their examination of the mines, to complainant and the others interested in the enterprise, and they reported to these persons that these mines were of great value, and better, in every respect, than had been represented.

The answer then alleges that upon this report of the committee on their return to Erie the company was formed, composed of certain persons, among whom were complainant and defendant Tuck, for the purpose of purchasing Scribner's interest in these mines and operating the same; that complainant, relying upon the report of the committee so made, purchased of defendant one share, being one twelfth, for five thousand dollars, executing his note at six months therefor, whereupon defendant executed to complainant a deed for such share. He denies that complainant was deceived by any representations made by Sanger or himself respecting these mines, and did not rely upon the same, but did rely upon the report of the committee alone. He denies he obtained the deed from Scribner for five thousand dollars, or a mere nominal sum, or that he represented to complainant or any one else that he had given Scribner forty thousand dollars, or any other sum, and denies all fraud. He admits leaving the note with Childs & Prince as collateral security for a loan of seven hundred dollars, and thereupon defendant entered his motion to dissolve the injunction.

At the March term, 1874, a general replication was filed, and the cause set for hearing at April term, 1874.

On the hearing, against the objections of defendant, the court permitted complainant to amend his bill, by alleging an offer and willingness on his part to reconvey to the defendant all his interest in these mines, and title conveyed to him by defendant by his deed.

A decree passed, as prayed in the bill of complaint, the note

in question declared fraudulent and void, and to be "annulled, set aside and canceled," and that Childs & Prince, upon the payment to them by complainant of the seven hundred dollars loaned defendant, and interest thereon, deliver the note to complainant, and that complainant reconvey the property to defendant, covenanting that he has done nothing to incumber it, etc.

MESSRS. BROWNELL & MONTONY, for the appellant.

MESSRS. WHEATON, CANFIELD & SMITH, for the appellee.

Mr. Justice BREESE delivered the opinion of the court.

This is an appeal from the Circuit Court of Cook County, to reverse a decree entered in that court in favor of Jerome F. Downing against J. H. L. Tuck and others, canceling a certain note executed by the complainant to the defendant Tuck, for certain mineral lands in Utah Territory, sold and conveyed by the defendant to complainant. The cause was regularly set for hearing on bill, answer, replication and proofs heard, and a decree passed as prayed. The defendant appeals.

It is unnecessary to consider the point made by appellant, questioning the right of the court to allow an amendment to the bill of complaint on the hearing, for, in our view of the whole case, appellee has no merits.

Appellee, under the second head of his brief, concludes there are three elements of fraud in this transaction, or three classes of fraudulent representations; and first, with regard to the price for which Scribner's two thirds interest could be bought; second, the representation made by appellant to appellee, that Camp and Scott had paid, each, five thousand dollars for a share, and that Noble had paid for two shares; and third, the false representations made by appellant as to the character, quality and condition of the mines.

On the first point, there being no fiduciary relation between the parties, such a misrepresentation, if one, is not sufficient cause to rescind a sale: *Banta v. Palmer*, 47 Ill. 99. If the price alleged to have been paid in that case, was thousands of dollars instead of units, the principle would be the same—

that is not controlled or affected by figures. We also refer to 1 Story's Eq. Ju., Secs. 199, 200; *Merryman v. David*, 31 Ill. 404.

But what are the real facts on this head? Scribner, through whom appellant claimed, was, with one Wood, the undisputed owner of the property in question, the legal title being vested in Scribner alone. He was an experienced miner and prospector, and had sold to Lucian P. Sanger an interest of one third in these mines, and they, not having the necessary capital, were desirous of finding those who had and were willing to invest, for the purpose of further developing and working the mines. Scribner was examined as a witness in this cause, and he stated, and it is not contradicted that the first time appellant went east with Sanger, he (Sanger) had a deed, or some other writing, giving him the control of this two thirds interest, and he had given his obligation to pay nine thousand dollars therefor in sixty days, or return the papers. There was no agreement between the parties as to the selling price to other parties. When they went east they were not acting for witness or Wood, but for themselves. No sales were made by Sanger at Erie, and he returned the papers to Scribner, who did, about the 24th of July, 1873, execute a deed to appellant for this interest. Appellant gave his obligation for nine thousand dollars, which recited if they did not get their pay in sixty days, they (Scribner and Wood) were to hold the mines—appellant was to reconvey to them. At any time, Scribner testifies, their interest could have been purchased for ten thousand dollars. He further testified, when Barr and Camp (the committee) were at Utah, appellant had the sole right to determine the value for which this two thirds interest should be sold. On the return of appellant to Utah, he paid Scribner for his interest, telling him the property had been sold for fifteen thousand dollars, saying he and Sanger still retained an interest, but how much witness did not know—don't think they ever told him.

Upon this point appellant testified that Mr. Noble asked him in his bank at Erie, the second time he was there, if he did not think if he (Noble) was to go to Utah, he could buy this property of Scribner for less money than appellant was asking for it. Appellant replied, "No, not a cent less," and this, as

appellant testified, for the reason he had the deed for the property in his possession, and showed it to Noble and said to Noble he had given Scribner his obligation. Appellant repeated this to the other parties, and showed to all of them the deed he had from Scribner, and told them he had given Scribner his obligation, not naming forty thousand dollars he had given, but that they could not purchase the mines for less than forty thousand dollars of Scribner, for it had ceased to be Scribner's property.

The pretense these parties were not dealing with appellant himself, but with Scribner through him, is put at rest by this testimony and by the exhibition of Scribner's deed to appellant for this property, sold and conveyed to him, in consideration of nine thousand dollars. All this occurred after the return of the committee from Utah, and after they had made their report, and shows conclusively, they were dealing with appellant as the owner of the property, which he, in fact, was.

Appellee testified that appellant told him the contract for the sale of the mines had virtually been transferred to him. Appellee then, before he bought and executed his note, knew when he was trading with appellant he was negotiating with the real owner of this two thirds interest, who made the representations he did make as owner of the property, eager to get the best price he could for it.

Now, when this deed to appellant, exhibited freely to appellee and all the other parties before the sale, showed on its face that the consideration paid or agreed to be paid by appellant was only nine thousand dollars, how could it be material if he did state he was bound to pay forty thousand dollars for it? There was the deed which appellee saw and read, expressing nine thousand dollars as the whole consideration. Can it be believed these parties could have been influenced by this declaration when they were confronted by the fact that nine thousand dollars was the price appellant had paid or was bound to pay Scribner? It is folly to urge that this statement of appellant influenced the action of appellee in any degree. It could not have been so, appellee being a man of business capacity, and the general western agent of one of the most extensive corporations in the Union.

Justice Story says, if a party knows a representation to be

false when made to him, it can not be said to influence his conduct; and it is his own indiscretion, and not any fraud or surprise, of which he has any just complaint to make under such circumstances: 1 Story's Eq. Jur., Sec. 202. Courts of equity do not aid parties who will not use their own sense and discretion upon matters of this sort.

Appellant was dealing with his own property, and had a right to "puff" it in the most extravagant terms, the other party being at full liberty to exercise his own judgment about it. There is nothing in the record to contradict appellant in these respects, and it must be taken as true. The deed spoke a language all could understand, and that informed these parties appellant had purchased the property for nine thousand dollars, and common sense should have taught them he had the right to sell it for as much as he could get for it, he himself occupying no fiduciary relation: *Banta v. Palmer, supra*.

It is not fair to say, as appellee does in his brief, that he was dealing with the appellant as a partner, and between partners the utmost good faith must be observed. The evidence does not show this relation.

A partnership is not the theory of the bill. Appellant owned this interest, and desired to divide it into eight parts, and sell as many parts as he could find buyers. When appellee bought one share, he became a tenant in common with appellant, and when the others purchased their shares, they also became tenants in common with appellant.

There were no articles of copartnership, verbal or written, no mutual responsibilities resting on these parties; the proceeds of the sales of the several shares belonged to appellant as proprietor and not as a partner. Not being a partner in a partnership, appellant was not responsible to any of them, and is not accountable to his co-tenants for his acts of sale. Besides appellee argues that appellant in this matter was acting as the agent of Scribner, and as such practiced the deceitful arts charged in the bill. If so, it is utterly impossible he could be a partner with appellee and the other purchasers, for he could not act for both. The whole case shows there was no relation whatever of trust or confidence between these parties; but it does show appellant owned the

property, and appellee bought one share after it had been thoroughly examined by a committee of gentlemen he aided in appointing, and without the least reliance on the representations of appellant. We think the proofs show that appellant

Having disposed of the first element charged as fraud by appellee, the second will be considered—the representations made by appellant to appellee that Camp and Scott had each paid five thousand dollars for a share, and Noble had paid for two shares.

If appellee chose to rely on such a statement when these persons were his near neighbors, seeing them, possibly, every day, it was his own folly. But, as we understand appellee's testimony on this point, he said, before he gave his note, appellant said he had "closed up" with all the other parties and delivered the deeds. Appellant did not say they had paid him, but that he had closed the matter with them by delivering the deeds. Had appellee desired fuller information on this subject, he could have inquired of the parties. But it is

strange that a man of business and experience, such as the appellee is, should place any reliance on such statements, and, whether true or false, it is impossible to believe they could have influenced the decision of such a man as appellee is represented to be; and it appears to us it was of no importance how appellant might dispose of this property, it being his own. How he closed up the matter with these persons was no business of appellee, and concerned him in no possible way.

The third element of fraud, and one most worthy of consideration, is the alleged falsity as to the character, condition and quality of these mines. We have searched the record with great care for proof to sustain the charge of falsehood in this respect. In addition to what we have said in regard to the purchase of a mining interest, we will state the facts as they appear to us in the record.

It is not denied, when the committee went to the mines to examine them they were treated with perfect fairness by Scribner, Sanger and appellant, and every aid afforded them to a full and satisfactory examination. The record shows all their acts were in the utmost good faith, and prompted by

a sincere desire to furnish all the information they could, before appellee and the others should make the purchase. What do the witnesses say on this point? Scribner says, the committee examined the mines thoroughly. They took up the ore; they broke off pieces, and witness broke off some from different places in the mines. They took that ore and returned to Salt Lake City, with the intention of having it assayed, and told him afterward they had it assayed. Scribner accompanied them to Brigham Cañon and Copperopolis, to examine the mines there; were gone two or three days, and while in Brigham Cañon they examined the Winnimuck mines. On their return they went again to these mines, took other specimens of ore, and examined the ground thoroughly, and told witness, when they got back to town, they got their assay certificates; and then Mr. Barr, in witness' room in Salt Lake City, said they intended to take the mines, and that they were better than Sanger and appellant represented, and that he was more than satisfied, and if they "played out" there was no one to blame. Scribner further says, the committee went to examine the mines in the Tintic district, in order to compare them with the mines in controversy—that was what they said. They went away satisfied, when they examined the Tintic mines, that these they were about to purchase would turn out as well, judging from what they could see.

Mr. Camp, one of the committee appointed by appellee and his associates, testified: We examined these mines and their development, and took specimens of the ore therefrom to assay, and on our return to Salt Lake City left them with the assayer, John McVickar, for assay by him. We then went to the East Tintic mining district, to visit the mines known as "Mammoth," "Copperopolis" and "Chrisman Mammoth," which we inspected. These were similar in their ores to the mines we were intending to purchase. We then returned to Salt Lake City and went from that place to visit the Winnimuck mines in Brigham Cañon. This last mine is only one and a quarter miles from the mines which were the subject of negotiation. On our return we made a second and further examination of the out-crop of the veins or ores, and of the ore in the openings and cuttings at or near the junction of the "Aqua Frio" and "Black Met llic" mines. We then returned to Salt Lake City,

where we obtained the report of the assayers, and made examination of the abstract of title of these mines at the recorder's office, and returned to Erie. On our return to Erie, the associates or parties spoken of were called together and our report made. The report was, that we found the situation, surroundings and development of these mines fully up to the representations made by Sanger and Tuck, and the assay of the ores, on an average assay three or four per cent. better than the assay Sanger and Tuck had shown at Erie, and the title thereto reported we found all right. Then a canvass commenced for getting up the association for the purchase of shares, when appellee took one, etc. Appellant in his testimony states that his object in visiting Erie was to interest capitalists there to such an extent that they would send a committee to examine these mines, and if they found them as good as represented, they could have a two thirds interest at the rate of sixty thousand dollars, or five thousand dollars each one twelfth. Drew up a subscription list, embodying these facts and conditions of sale. Among those who signed it was the appellee. Met the committee appointed to examine the mines at Joliet and proceeded with them to Utah. Took them to the mines, which they carefully examined, made measurements of the work done and of the amount of the ore inside, and estimated the amount of the ore in the dump, and they said the out-crop and the appearance of the indications of these mines were really superior to that of the out-crop of the "Mammoth" and "Copperopolis." While at the mines the committee took a large number of samples of ore from the mine in different locations, and also from the dump, and brought them to Salt Lake City for assay. He further testifies that Barr, on the next day, employed Scribner to go back to these mines and purchase another mine, called an extension of "Aqua Frio," which he did, Barr paying for the same by draft. The committee remained thereafter at the city one day to attend to the assays, and went again with witness to the canon to buy a location for a furnace site. Met Scribner there. The ground was selected, and Barr authorized Scribner to buy it, which he did, taking deed to Barr; next day started for home. Barr left the train at Peru for a short visit. Witness left at Joliet, promising to meet them at Erie

at an early day to perfect the papers. The committee were more than pleased with the mines. They made a written report from Utah about them, and at Erie a meeting was called and the report considered, and Barr then and there, having before his visit to the mines taken one share, said he would take two shares and did so. A company was then organized, of which appellee was president. Appellee was to have paid cash for his share, but complaining of hard times and that he had been purchasing real estate, asked indulgence of six months. Witness had employed nine men at the mines, and commenced taking out ore immediately and piled on the dumps as much as one hundred and fifty tons, as he thought. It was measured and amounted to more. Had business East, and left the mines in charge of Joseph Hicks, as foreman. When East, Mr. Barr, in November, about the middle, came out to the mines which had been worked since August 20th. By Barr's orders work was suspended entirely.

* This witness fully sustains the others as to the favorable appearance of the mines. Lucien P. Sanger was familiar with the mines and corroborates all that has been said as to their flattering appearance. The assays averaged 23.7 copper, \$70 in silver, and from five to eighteen dollars in gold, to the ton. He went to Erie to get capital to assist in developing the mine, he owning one third of the whole; rode with Barr from Joliet to Chicago on his return from examining the mines, and conversed freely with him; he said he had examined them thoroughly; had been to Tintic and examined the mines there having the same character of ore; that the prospects were better than he and appellant had represented them; his opinion, as a miner, is, that the mines should be worked by all means, the indications being there is there one of the biggest mines in the country. Witness was a large owner in these mines, and had paid all his assessments. On October 20, 1873, the drift was 120 feet; after going through barren ground a number of feet, the rock was becoming very much stained; had it assayed, and it went \$403 to the ton in silver; believes these stains indicate the biggest kind of mineral; regrets the work was stopped, for the ground is not proved at all; stopped without his knowledge or consent, without consulting him, while he was absent in the States; it was bad policy to stop.

Experienced miners, well acquainted with these mines, testify the ores are copper, gold and silver producing ores; from out-crops and outside appearance, the mine was very large; such property worth sixty thousand dollars; in buying and selling mines, people buy and pay, or agree to pay, according to the prospect in sight; out-crop very flattering, showing a large amount of mineral in sight in the open cuts and stripings; the work done on them in August and September done with very poor judgment; the tunnel was run according to the stratification, when it should have been run to cut the stratification, so as to cut the vein; acquainted with similar mines in that vicinity, but with none with a prospect so flattering as the mines in question; from the out-crop and ore in the dumps would consider the property worth from seventy-five thousand dollars to one hundred thousand dollars; parties purchase mines on the prospect, without warranty or guaranty, and on the mineral in sight; there is no custom requiring guaranty or warranty. Tuck is an honorable man, and well posted on mining and scientific matters connected therewith; have a high opinion of the property from its showing; never been in Tuck's employment.

Another witness says, the finest prospect on the surface he ever saw; the out-crop indicated a very valuable mine; at the time this was sold, no mines were being sold in that vicinity of a similar kind; such a thing as a warranty of a mine on the Pacific coast is unknown; no custom of the kind; buy and sell on the ore in sight; several mines very valuable now there, lately discovered.

Joseph Hicks, an experienced miner, worked these mines two months for Scribner and three months for the Erie Mining and Smelting Company; ordered to quit work by Barr; prospect favorable, when he quit, of striking ore in paying quantities, but impossible to tell how soon; judged it bad policy to quit; impossible to tell the actual value of a mine by the prospect; indications good; met Camp and Barr at the mines; they examined the mines two different days; took samples of ore; when they visited it in July, 1873, the prospect was favorable for a large mine.

McVickar, the assayer, testifies the out-croppings of these mines are similar to those of the "Mammoth" and "Copper-

opolis;" no guaranty is given as to the quantity of ores or minerals which will be produced from mines, in selling them; people buy from the prospect in sight; have made a great many assays from these mines, some for Scribner; and in August last made five for Barr and Camp; the average of those assays would be about $24\frac{1}{2}$ per cent. copper, seventy dollars in silver and eleven dollars in gold per ton of two thousand pounds; gave these results to Barr and Camp.

This proof shows clearly that, at the time the sale was made and this note was executed by appellee, the mines were substantially as represented by appellant and Sanger, and the committee that examined them thought them even better.

Against this mass of testimony as to the appearance of the mines when sold to appellee and others, we have the testimony of Wellington Downing, son of appellee, a young man about twenty-three years of age, who was sent out to the mines in August, 1873, who had no experience, and who, Sanger testifies, acted as cook to the hands and took charge of the water supply, and sometimes the check roll of the men. He quit in November following, because no encouragement to proceed further—indications then very unsatisfactory.

Barr also figured as a witness for appellee; what he discovered on his second visit to the mines, in October, 1873, or how they appeared, has nothing to do with the decision of this case. The purchase was made on the faith of his report as one of the committee, in July previous. The proof, as we have seen, sustains the representations then made. Just before he made this second visit, the great money panic of September had produced dismay and trouble throughout all departments of business, and these gentlemen, though connected with large moneyed corporations, found it difficult to raise means. Money is the sinew of mining, as of war, and that supply failing, the mines were a fraud, and the whole thing a cheat and a swindle. It matters not how the mines turned out. If the prospect was as represented when appellants sold, the purchasers are bound to stand to the bargain.

Who are these purchasers complaining? The complainant, Jerome F. Downing, is a man forty-seven years of age, residing in the important borough of Erie, in the State of Pennsylvania, and the general manager in the West of one of the most

known and substantial insurance companies in the United States, known as "The Insurance Company of North America, at Philadelphia."

Orange Noble, another member of this Erie Mining Company, was fifty-six years of age, the president of the "Keystone National Bank of Erie."

Matthew R. Barr was fifty-six years of age, and had been for a long time prior to this transaction, engaged in the iron foundry business. He was one of the committee to visit these mines in person. These persons were the principal witnesses for complainant, and their testimony, at first blush and without a careful examination, might tend to sustain some of the allegations in the bill of complaint. It is upon proof of these allegations, if they establish fraud, that relief can be had, and upon them only. A party can not make out one case by his bill and another by his proof—they must correspond. The nature of the subject bargained for, and what was sold; the character of the representations made, whether true or false, and if false, were they material; and how does the evidence preponderate, taking the whole case into consideration; and care must be observed in order to distinguish mere opinion from facts.

After a careful examination of this record, we are satisfied no false representation of facts is established against appellant, unless it be in respect to the amount he was to pay Scribner for his two thirds interest in these mines, forty thousand dollars, and for which he had given his personal obligation. Appellant denies having made this latter statement, but in this he is contradicted by several witnesses, all interested, who testify he did so state. But we hold, admitting he did so state, it was of no importance; it was not a fraud in legal contemplation, there being no relation of trust or confidence between these parties, creating a duty resting on appellant to state the truth. It might be morally wrong, but the law can not lay hold of it. This doctrine was distinctly announced by this court in *Banta v. Palmer*, 47 Ill. 99. There, the plaintiff had paid defendant eighty-five dollars per acre for the land, on defendant's representation to him that he himself had paid that sum for it, when, in truth and in fact, he had paid but seventy-five dollars per acre for it. The court

say, if no fiduciary relation existed between the parties, however wrong, morally, it may have been in the defendant to misrepresent the price he had paid for the land, the misrepresentation does not entitle the plaintiff to recover back the difference between what he had paid for the land and what it had cost the defendant.

These gentlemen trading for these mines were old and experienced men of business, mingling and taking active parts in the struggles of life, and it could be of no possible advantage to them, in determining how much they could risk in a speculation like this, what the seller had paid or was bound to pay for it. Besides, this representation could have had no effect when the deed from Scribner to Tuck, conveying his two thirds interest, expressed a consideration of nine thousand dollars only. These parties purchased on the strength of this deed, as assuring Scribner's title to be in appellant for the consideration of nine thousand dollars.

If one has a horse, and proposing to sell, shall assert that he paid one thousand dollars for him, when the bill of sale expresses a consideration of one hundred dollars only, it can hardly be said a purchaser of the horse for two hundred dollars, and that sum greatly above his value, can hope to rescind the contract on the ground of such a misstatement. The truth is, such statements by practical men, as these parties all are, are never regarded, and enter not into the conclusions they may reach as to the value of an article. Practical men, like these, act on their judgments of values. The declarations of appellant, that he had given his personal obligation to Scribner for forty thousand dollars, was to these business men but as the idle wind, the mere vamping of one whose only object was to get a high price for an article he owned and desired to sell.

This court said, in *Miller v. Craig*, 36 Ill. 109, upon this question of fraudulent misrepresentation, the appellant, in endeavoring to effect a trade with appellee, used no more artifice than is usual and allowable where a party wishes to dispose of property, real or personal. He has a right to exalt the value of his own property to the highest point his antagonist's credulity may bear, and depreciate that of the other party. This is the daily practice and no one has ever sup-

posed that such boastful assertions or highly exaggerated description amounted to fraudulent misrepresentation or deceit. The parties were dealing at arm's length and on equal grounds, and their own judgments were to be their guide in coming to a conclusion. It is proved that complainant had the fullest opportunity of which he availed, to examine the property, and afterward moved into it.

It will be remembered, the evidence shows that no sale was effected by appellant on his first visit to Erie with Sanger. They went there for the purpose of procuring capitalists to embark in this mining enterprise, all of which are in their incipency hazards which few besides practical men are willing to incur, and men who have money to invest. The world is full of such, no one of whom enters into associations of this nature with a certainty of ultimate success. Appellant, as a practical geologist, had freely and earnestly expressed to these people his convictions of the value of these mines, but he desired, before any investment was made, a committee should proceed to Utah, examine and report. A committee was raised, of which Barr, a man of great experience in the iron foundry business, was one. Mr. Irving Camp, also a prominent business man of Erie, was the other member of the committee, and they, with appellant, proceeded to these mines; examined them critically; went eighty miles farther south to visit the mines of East Tintic, to compare the ores of the mines controlled by appellant with the ores of these rich and productive mines. They returned and again visited these mines, again examined the prospect, broke off fragments of the ores, took them to a noted and competent assayer at Salt Lake City to be assayed, who pronounced them such ores as had been represented and as valuable, and the committee were well satisfied with the prospect and with the promises of rich returns. So much pleased was Mr. Barr with the appearance that he purchased on his own private account an adjoining mine, for which he paid several thousand dollars.

The committee returned to Erie and made their report, in all respects favorable, though appellee testified it was not satisfactory to him. Yet he did, of his own free will, after the report was made, purchase one twelfth interest, and executed

the note in question therefor. It is idle to say or pretend this report did not influence him, but the false representations of appellant did; that he relied upon them, and not upon the report of the committee. But the truth is, the report of the committee sustained appellant substantially in the declarations he had made. It is not proved he was guilty of stating anything which was not true, save and except as to his personal obligations to pay Scribner forty thousand dollars, and this, we have shown, was unimportant, and not such a deceit as the law forbids.

It is in proof that appellant rendered all the assistance in his power to the committee in their examination, and made to them many statements of the richness of the vein, its extent and value, and spoke of it as the mother vein of all this country; that there never was such a "blow-out" without there being a mammoth vein. This was all matter of opinion on appearances visible to the committee men, and on which they could form their own opinions, and did so, and were satisfied with the prospect; so reported to appellee and their other associates; after which they executed their notes. It is in proof that, in buying and selling mines, people buy and pay, or agree to pay for them, influenced by the prospect. No man, however scientific he may be, could certainly state how a mine, with a most flattering out-crop or blow-out, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. "The sight" determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their out-crop!

The extravagant declarations of appellant after his return to Erie with the committee of examination, and made in their presence, that a silver mine with copper croppings was an inexhaustible mine of wealth; that the "Aqua Frio" and "Black Metallic" were the biggest things in Utah; that situated at the Fork Hills was greatly to their advantage; that they were

well developed mines, with well defined veins; that he had never seen, in all his experience, such a "blow-out;" that a furnace ought to be erected at once, as the ore could be mined and all the money put into it could be got out in a few months, was mere gassing, and for the purpose of extolling what these men, through their committee, had seen and could judge of the prospects and promise for themselves. There was nothing unlawful or prohibited in law in all this. It was after this examination and report by Camp and Barr the share was bought by complainant, and the note in question executed and a deed delivered and accepted for the property. It is impossible their statement should be regarded as anything more than opinions, for no man can tell how a discovery like this may result. Appellee could have understood them in no other sense and the same may be said of the report of the committee. They were opinions founded on facts as they appeared to them.

Suppose, in the oil region, which is in the neighborhood of appellee and his associates, an explorer there had sunk a shaft out of which flowed ten barrels of oil in twenty-four hours, and in the next twenty-four hours twelve barrels, and continued to flow ten or twelve barrels a day, and he should extol it as the best well in all that region; should induce Erie capitalists to visit it, who go and see the flow, and are more than satisfied after a critical examination, and they return with the owner to report, and he again makes the most extravagant representations; asserts it is the mother well of all that country; that there never was such a flow without there being an abundant supply; that it would flow one hundred barrels in twenty-four hours, and it could be purchased for fifty thousand and no less; a company is formed, each taking one share at five thousand dollars; one of the associates is made president of the company, as this complainant and appellee was of the Erie Mining Company; should send his son, a young man without experience, to manage the well, and soon after one of the leading associates should visit the well and find it was flowing less than five barrels in twenty-four hours; could, under such circumstances, a court of equity interfere to rescind the contract on the ground of false representations? Where is the essential difference between the oil well and the mineral discovery?

One is a liquid, the other a solid, and that is all the difference. In purchasing the oil well they would buy from "the prospect," and no court would hold the extravagant assertions of the seller as anything more than gassing. The court would not hold them as statements of fact, but as opinions, which the fact as it appeared justified, or at least presented ground on which to base the statements. So in the sale of a mine. These exaggerated statements are always made, and a man's own natural judgment must be his counselor and guide. The great "Comstock" mine of Nevada, which has poured into the country its millions of silver, was bought and sold on the prospect and for a few dollars. The discoverer could not pry into futurity; he took his chances for a few dollars, whilst those purchasing have a bonanza of scarcely appreciable value.

It is in proof the son of appellee, a youth inexperienced in mining operations, was sent out in August, 1873, to oversee these mines, and the operations to be performed there, and in October of that year Mr. Barr again went to the mines and was disappointed; gave it up as a bad job; thought they had been swindled; whilst Hicks, a practical miner in charge of the mines, and Tuck and Sanger, who owned an interest twice as great as any one of their associates, protested against quitting work, being well assured by perseverance their brightest hopes would be realized. In September, 1873, the great money panic occurred, and it is quite probable these gentlemen's associates found it somewhat difficult to raise the money necessary to develop these mines fully, and because no rich vein was immediately struck they quit the matter in disgust, and now insist upon rescinding the contract on the ground of fraud. Whilst writing this last paragraph, a newspaper article attracted attention. It was in regard to a recent discovery of a silver mine, at Newburyport, in the State of Massachusetts, a locality where it was never supposed silver ore had a home. The statement was this: "Six hundred feet of land on the Boynton lode were sold last week to a Springfield company for one hundred and sixty thousand dollars." This purchaser has purchased on his judgment from the indications, as complainant did on the report of his committee. Should this six hundred feet turn out to be a bad speculation, could the courts of Massachusetts be successfully invoked to

rescind the contract, and have the notes, executed for the purchase money, if that was the fact, given up to be canceled? We fail to see any real difference in the cases.

We are familiar with the facts that there is a large class of cases in which courts of equity will grant relief where there has been a misrepresentation, or, as it is called, *suggestio falsi*. To justify such interposition, it is not only necessary to establish the fact of misrepresentation by clear proof, but it must be about a material matter, or one important to the interests of the party complaining; for if it was of an immaterial thing, or if the other party did not trust to it, or if it was a matter of opinion or fact equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other, there is no reason for equity to interfere to grant relief on the ground of fraud: 1 Story Eq. Jur., Sec. 191. The misrepresentation must not only be in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other. It must not be a mere matter of opinion equally open to both parties for examination and inquiry, where neither party is presumed to trust to the other, but to rely on his own judgment. Matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against. Thus a false opinion, expressed intentionally, of the value of the property offered for sale, where there is no special confidence or relation, or influence between the parties, and each meets the other on equal grounds, relying on his own judgment, is not sufficient to avoid a contract of sale: *Ib.*, Sec. 197.

Again, it is said, nor is it every willful misrepresentation of a fact which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it; for courts of equity, like courts of law, do not aid parties who will not use their own sense and discretion upon matters of this sort: *Ib.*, Sec. 199. This is illustrated by a case at law, *Vernon v. Keys*, 12 East, 637, where a party, upon making a purchase for himself and his partners, falsely stated to the seller, to induce him to the sale, that his partners would not give more for the property than a certain price. It was there held by Lord ELLENBOROUGH, that no action at law would lie for a deceitful representation of this sort.

Story thinks (1 Story Eq. Jur. Sec. 200), a court of equity, under like circumstances, would probably hold a somewhat more rigorous doctrine, at least if the party appeared to have been materially influenced by the representation, to his disadvantage; and if it did not avoid the contract, it would refuse a specific performance of it. But, he says, in all such cases the court will not rescind the contract without the clearest proof of the fraudulent misrepresentations, and that they were made under such circumstances as show the contract was founded upon them. He further says, Section 200a: On the other hand, if the purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or his agents, he can not be heard to say that he was deceived by the vendor's misrepresentations, for the rule is, *caveat emptor*, and the knowledge of his agents is as binding on him as his own knowledge. Courts of equity do not sit for the purpose of relieving parties under ordinary circumstances, who refuse to exercise a reasonable diligence or discretion.

On puffing and commendation of commodities this author says: However reprehensible in morals are gross exaggerations or departures from truth, they are, nevertheless, not treated as frauds which will avoid contracts. In such cases, the other party is bound, and, indeed, is understood, to exercise his own judgment, if the matter is equally open to the observation, examination and skill of both: Sec. 201.

These principles have been recognized by this court in several cases. To test this case by them, we have given a full statement of the leading facts.

That the prospect hanging over these mines in July, 1873, when appellee purchased, was as represented, the testimony is conclusive. The seller was not responsible for their condition or for their ultimate value at a future time. There was no warranty—no guaranty, and never is in such sales. That this was a rich mineral region, we are informed by the report of Mr. Raymond, United States Commissioner of Mining Statistics, made to the Secretary of the Treasury in March, 1872.

In speaking of the "West Mountain Mining District," the *situs* of the mines in question, he says, among the numerous

claims there may be mentioned the Winnimuck—two thousand feet located—vein varies in width from a foot to ten and a half feet. The ore is argentiferous galena and carbonates. An English company paid \$450,000 for the property. The mines are located at the head of Brigham cañon, and the claims cover several hills by being staked out on imaginary veins running in all conceivable directions. This ore contained only from four to thirty dollars in silver per ton: pp. 314, 315.

Speaking of the Tintic district, he says it is about seventy miles southeast of Salt Lake City. It, as also the Winnimuck, was visited by Barr and Camp, the examining committee, and in the "Mammoth" there is a remarkable deposit of copper ore in limestone, cropping out upon the entire slope of a hill facing the broad and well-wooded valley of the Tintic.

Much of the ore is ferruginous and poor in copper, but there are masses of rich, dark-colored ore, mixed with green and blue carbonates of copper. Considerable quantities of this ore are shipped to Swansea (in Wales): p. 317. The percentage of copper in the ores from these claims varies with the care taken in selecting. From ten to fifty per cent. may be regarded as a profitable range for the ore in shipping quantities. A very considerable quantity will not run over eight per cent. The value of silver is reported to be from twenty to one hundred dollars per ton: p. 318.

The proofs show, by the assay of the ores of the mines in question, a greater percentage of copper and silver than these, besides eleven dollars in gold to the ton, so that as a speculation, which all such purchases are, they were worthy the attention of men of capital, eager for sudden and great wealth.

In this region is the celebrated "Emma" mine, one of the most remarkable deposits of argentiferous ore ever opened. Of it he observes, without any well marked croppings, there was nothing on the surface to indicate the presence of such a mass of ore, except a slight discoloration of the limestone, and a few ferruginous streaks visible in the face of a cut made for starting the shaft: p. 321.

Mr. Barr need not have been discouraged in October, on his return to the mines, which had been improperly worked,

by "the rock stained by carbonate of copper and chloride of silver," which he observed. Hicks, the experienced foreman, however, was not discouraged; but as Barr and his associates had, by their shares, a controlling influence, the works were injudiciously abandoned. But this does not affect appellant's claim nor determine his rights, as we think he has maintained, by proof, all material statements made by him, and which were confirmed by the report of the committee on which, we are bound to believe, appellee acted. These mines, like all others, were sold on the appearance, on the prospects, as they appeared to Camp and Barr when they visited them in July, 1873. Like an oil well flowing ten or more barrels in twenty-four hours, encouraging the hope it would flow one hundred or more in the same time, and so continue, but is exhausted in a few days, no reason for a cancellation of a contract for its sale can possibly exist. So with a copper mine, or any other mine.

These parties may have made a bad speculation, but as this court said in *Walker v. Hough*, 59 Ill. 375, to justify a court in rescinding a contract executed by both parties, on the ground that one of the parties was induced to enter into it through fraud practiced by the other party, the testimony must be of the strongest and most cogent character, and the case a clear one.

Appellee may be a loser by engaging in this speculation, but he did so uninfluenced, as we believe, by any misrepresentations of appellant. It is not for every losing bargain a court of equity will interpose to relieve.

The decree of the circuit court is reversed, and the cause remanded.

Decree reversed.

ARNOLD V. BAKER ET AL.

(6 Nebraska, 134. Supreme Court, 1877.)

"Jumped" claim—General allegations of fraud, in pleadings, not sufficient. Plaintiff's petition stated that the defendant had falsely and fraudulently represented that he, the defendant, had "jumped" a certain claim in Deadwood, "whereby he was at that time the lawful owner thereof, according to the mining laws of said district, all of which statements," etc., were false and fraudulent; and upon such false representations had sold his interest in the claim to the defendant: *Held*, that while a contract procured by fraud may be rescinded at the election of the injured party, a general allegation of fraud is not sufficient; the particular circumstances which constitute the fraud must be stated; the allegation that defendant was not at any time the "lawful" owner, according to the mining laws of said mining district, is not such a statement of facts as would authorize a rescission.

Appeal to Supreme Court from judgment on demurrer. Where a demurrer to a petition in a suit in equity is sustained in the district court, the cause may be taken by appeal to the Supreme Court.

This was an appeal from Platte county. The cause was heard below before Post, J., on demurrer to the petition, and judgment rendered against the plaintiff. The facts necessary to an understanding of the case are stated in the opinion.

S. S. McALLISTER, for appellant.

WHITMOYER, GERRARD & POST, for appellees.

MAXWELL, J.

This is a suit in equity for the rescission of a contract on the ground of fraud. The petition alleges that "the defendant falsely and fraudulently stated and represented to the plaintiff, that after the plaintiff had left said mining district (on Deadwood creek, Dakota Territory), that he had 'jumped' and taken the claim aforesaid, whereby he was at that time the lawful owner thereof, according to the mining laws of said district, all of which statements and representations were false, fraudulent and untrue, in this, to wit: that the said

¹ *Byard v. Holmes*, 6 M. R. 657.

defendant was not at any time the lawful owner of said claim or any interest therein according to the mining laws of said mining district."

It also appears from the petition that the plaintiff had previously owned one fourth of the mining claim in question, and the defendant, Baker, claiming to be the owner of the entire claim had conveyed to him by quitclaim deed three fourths of such claim. It is not stated in the petition who was in possession of the claim at the time of the execution of the deed.

That a contract procured by fraud will be rescinded at the suit of a party defrauded is well settled. But in such action, the particular and precise circumstances which constitute the alleged fraud must be stated in the petition. It is not enough to allege that a party by false and fraudulent representations induced another to enter into a contract, but he must state the facts on which he bases his claim for relief.

The allegation in the petition that the "defendant was not at any time the lawful owner of said claim or any interest therein, according to the mining laws of said mining district" is not such a statement of facts as will authorize this court to rescind the contract. The judgment of the district court therefore must be affirmed.

The action was properly brought into this court by appeal. Where a demurrer to a petition in suit in equity is sustained the case may be appealed to this court. In *Stewart v. Carter*, 4 Neb. 564, the petition contained two causes of action, one legal and one equitable. The cause was dismissed by the district court on the ground of misjoinder of causes of action.

In such case it was held that the case should be brought into this court by petition in error.

Judgment affirmed.

BANTA V. SAVAGE.

(12 Nevada, 151. Supreme Court, 1877.)

False pretense of irrigating facilities—Appurtenances—Constructive admissions in pleading. Defendant had sold to plaintiff a ranch. Plaintiff brought action for damages, alleging that defendant had represented that all the waters of Thomas creek “belonged to him to use and appropriate as his own.” Defendant denied making the representations, and further averred that the deed executed to consummate the sale did not convey any water rights, either in the description or under the word “appurtenances”: *Held*, that this latter defense was an admission by the defendant that the waters of Thomas creek were not appurtenant to the ranch, and precluded him from showing that plaintiff had lost the use of the water through the trespasses of other parties in diverting it.

¹ **Materiality—Opinions—Facts.** False representations do not amount to fraud unless they are made as to material facts, nor do opinions expressed make a party liable; whether statements were intended as matters of opinion or as averments of facts is for the jury.

Conversations and conduct. The defendant had taken plaintiff over the land, crossed the streams in controversy and the ditch, impressing the fact that the irrigation facilities were complete: *Held*, that the conduct, as well as the conversations, was to be considered by the jury in determining the question of fraud.

² **Caveat emptor not applied to active fraud.** A vendor may be silent and be safe; but he may not by acts or words lead the buyer astray.

Appeal from the District Court of the Second Judicial District, Washoe County.

The facts are sufficiently stated in the opinion.

R. M. CLARKE, for appellant.

I. The court erred in denying the second instruction asked by the defendant. What defendant expressed was a mere opinion for which he is not responsible in law: 2 Pars. on Cont., 275-76, notes j k; 1 Story on Cont., Sec. 637; *Long v. Woodman*, 58 Maine, 52; *Holbrook v. Conner*, 60 Maine, 578; *Cooper v. Lovering*, 106 Mass. 77; *Mooney v. Miller*, 102 Mass. 217.

II. The court erred in denying defendant's fourth instruction. If the water of Thomas creek below the Bowker ranch

¹ *Clapham v. Shillito*, 6 M. R. 432; *Gordon v. Butler*, 105 U. S. 553.

² *Boicman v. Bates*, 6 M. R. 363.

in fact belonged to the Geller ranch, and the plaintiff suffered the farmers above to divert it, and deprive him of its use, then he can have no action. It was not the defendant's duty to make the water flow to plaintiff's land or to protect his estate against trespassers.

III. The court erred in denying defendant's fifth and giving plaintiff's first instruction. The answer is not an admission that the waters of Thomas creek do not belong to the Geller ranch; because Thomas creek is a natural watercourse and as such is not "appurtenant" but "parcel" of the land: *Vunsickle v. Haines*, 7 Nev. 266; Angell on Watercourses, Secs. 6, 8, 9, 92.

Furthermore, the cause was tried upon the theory that it was a vital issue whether Thomas creek belonged to the ranch or not, and upon this issue proofs were admitted and arguments made; and the rule established after the case was closed, and when too late to amend, was a surprise and injury to the defendant which the court ought not to tolerate.

ELLIS & KING, for respondent.

I. The declaration of the defendant to the plaintiff, that there was water enough or plenty of water to irrigate the ranch at any time, or to flood the ranch in two hours, was not the mere expression of an opinion. There is nothing problematical or conditional in it. The existence of a fact was the subject of conversation and of inquiry; that fact was the most natural one to be ascertained. Upon the existence of a state of facts, as by the defendant asserted, a bargain was to be effected. That state of facts was not only asserted to exist at all times, but was then illustrated by defendant.

In all respects this declaration is unlike the giving of a mere opinion. It is not the language of "*puffing*": 1 Story on Contracts, Sec. 637, note 2, and cases cited; as to whether this was merely the expression of opinion, 18 Vt. 176; 1 Story on Contracts, Sec. 636, note 3, and cases cited; 1 Parsons on Contracts, 578.

II. The court did not err in refusing the fourth instruction of the defendant, which is assigned as error. The pleadings settle this question. It is asserted in the answer that the

waters of Thomas creek do not belong to the Geller ranch, so, also, the complaint alleges. There is in the answer no denial of this allegation in the complaint: 15 Cal. 638; 12 Cal. 403. As to the admissions in the answer, and their effect against general denials therein contained: *Fremont v. Seals*, 18 Cal. 434.

By the Court, HAWLEY, C. J.

This is an action to recover damages for alleged false and fraudulent representations of and concerning certain water rights, privileges and appurtenances, represented by defendant as belonging to the Geller ranch. The facts material to be considered, as testified to by plaintiff, may be briefly stated as follows:

The plaintiff, Banta, came to Washoe county a stranger, desirous of purchasing a farm. Hearing that the defendant, Savage, wished to sell the land known as the "Geller ranch," he went to see him, and after making known his errand, the defendant exhibited his title papers and said that "all the waters of Thomas creek below the Bowker ranch belonged to the Geller ranch." In proof of this statement he read the deed from Geller to him, and called plaintiff's particular attention to this clause: "The party of the first part herein conveying to the party of the second part all his right, title and interest in and to the water of the Thomas creek, after the same leaves the ranch known as the Bowker ranch." The parties then went upon the land and continued talking about the water for irrigation. The defendant told plaintiff "there was water enough to flood the ranch in two hours at any time."

After these statements the defendant conducted plaintiff to Dry creek (the plaintiff supposing it from previous conversations to be Thomas creek), and pointed out a ditch leading from a dam in the creek, which he said conducted the water to the ranch. No water was running in the ditch, it being out of repair. There were about seventy-five inches of water running in the creek, which the defendant said would increase when the farmers above began to use water for irrigation from the Truckee river. Dry creek is not upon the land sold to plaintiff; Thomas creek is.

In traveling over the land the parties crossed Thomas creek; there was no water running in it at the time. Plaintiff did not know that it was Thomas creek, and the defendant did not point it out as such.

The plaintiff, relying upon the representations of defendant, that there was water enough belonging to the land to irrigate it, bought the property for forty-five hundred dollars. The deed from defendant to plaintiff conveys the land "and appurtenances," but does not mention any water, water rights or privileges.

The testimony upon the part of plaintiff, at the trial, tended to show that all the representations made by defendant were false; that defendant knew them to be false; that the plaintiff was induced to purchase the land, believing them to be true, and that he had been damaged in consequence thereof.

The jury found a verdict in favor of the plaintiff for six hundred dollars, and defendant appeals.

Upon the trial defendant introduced evidence tending to prove that the waters of Thomas creek below the Bowker ranch did belong to the Geller ranch, and that the farmers above the Geller ranch had diverted the water and deprived the plaintiff of its use. But the court, at the request of plaintiff's counsel, notwithstanding the fact that such evidence had been introduced without objection, instructed the jury "that the parties by their pleadings in this action admit that the waters of Thomas creek do not belong to and are not appurtenant to the Geller ranch or the land described in the complaint," and refused to give the fourth and fifth instructions asked by defendant. We think the action of the court in this respect was correct.

It is alleged in the complaint that the defendant represented that the waters of said Thomas creek "belonged to him, to use and appropriate as his own at all times for irrigation upon said ranch," and that the right and title thereto was in him. It is averred that said representations about said water and the use thereof, and the ownership thereof, were false and fraudulent, and were made by defendant to deceive plaintiff and to induce him to purchase said ranch.

The defendant in his answer denies that he ever made any such representations, and for affirmative matter alleges: "That

at the time mentioned in the complaint, and for the consideration therein mentioned, he bargained with the said plaintiff to sell him the Geller ranch and other land described in the complaint, and gave him (plaintiff) a quitclaim deed or deeds therefor; that no water, water rights or privileges of any kind were mentioned in said deed or deeds to plaintiff nor were they appurtenances of said ranch or lands, defendant thereby selling the right, title and interest in and to said lands which he himself had, and that plaintiff took and could take no other."

After a careful examination of all the averments in the complaint and answer, which are unnecessarily lengthy and very carelessly drawn, we are of opinion that the plaintiff, under the pleadings, was not required to offer any proof that the waters of Thomas creek did not belong to or were not appurtenant to the Geller ranch, and that the defendant was estopped by the averments and admissions in his answer from relying upon any such defense.

As the defendant did not ask leave of the court to amend his answer in this respect, he must be bound by his own positive averments: *Blankman v. Vallejo*, 15 Cal. 645.

It follows, therefore, that the court did not err in giving the first instruction asked by plaintiff, and refusing to give the fourth and fifth instructions asked by defendant.

The court did not err in refusing to give the second instruction asked by defendant. It reads as follows: "The jury are instructed that no representations, however false, amount to a fraud in law unless it be of a fact which fact is material to the contract or transaction; that the mere expression of an opinion which opinion does not involve the assertion of a fact, although the opinion be incorrect, will not make the person expressing the opinion liable in an action for false and fraudulent statements; and that the statements alleged to have been made by Savage to Banta, to wit, that there was water enough, or plenty of water, to flood or irrigate the land, is not such a statement as will support this action or entitle the plaintiff to recover, if, in fact, such statement was made and is false."

The first and second clauses in the instruction are correct, but the last is erroneous in this: that it infringes upon the

province of the jury, whose duty it was, under all the facts and circumstances of this case, to decide whether the representations as made by defendant were intended as the statement of a fact, and whether they were so received and acted upon by defendant, or were mere expressions of opinion.

Story, in his work on Contracts, in discussing the various questions presented by the misrepresentations of the vendor, lays down the rule as follows: "If the seller fraudulently misrepresents facts, or states facts to exist which he knows not to exist, his fraud would vitiate the contract, provided the misstatements were in respect to a material point." (Section 636.) But where a statement is not made as a fact, but only as an opinion, the rule is quite different. Thus a false representation as to a mere matter of opinion * * * does not avoid the contract. * * * Ordinarily, a naked statement of opinion is not a representation on which a buyer is legally entitled to rely, unless, perhaps, in some special cases where peculiar confidence or trust is created between the parties. The ground of this rule is, probably, the impracticability of attempting to discover by means of the rules of law the real opinion of the party making the representation, and also because a mere expression of opinion does not alter facts, though it may bias the judgment. Mere expressions of opinion are not, therefore, considered so tangible a fraud as to form a ground of avoidance of a contract, even though they be falsely stated. * * * Yet, where a representation is made, going to the essence of a contract, the party making it should be careful to state it as an opinion, and not as a fact of which he has knowledge, or he may be liable thereon. The question whether a statement was intended to be given as an opinion, and was so received, is, however, one for jury to determine, upon the peculiar circumstances of the case. But whenever a belief is asserted, as in a fact which is material or essential, and which the person asserting knows to be false, and the statement is made with an intention to mislead, it is fraudulent and affords a ground of relief." (Section 637.)

Now, in this case, it was not only the duty of the jury to consider all the statements made by the defendants while upon the ranch, concerning the water, but they were also authorized to take into consideration his conduct as well as his representa-

tions, and to determine from all the facts and circumstances whether or not his representation "that there was water enough to flood the ranch in two hours," was made as a mere expression of an opinion, or was a statement of a fact that was calculated and intended to deceive and mislead the plaintiff. "The common law does not oblige a seller to disclose all that he knows which lessens the value of the property he would sell. He may be silent, leaving the purchaser to inquire and examine for himself, or to require a warranty. He may be silent and be safe; but if he be more than silent, if by acts, and certainly if by words, he leads the buyer astray, inducing him to suppose that he buys with warranty, or otherwise preventing his examination or inquiry, this becomes a fraud, of which the law will take cognizance. The distinction seems to be, and it is grounded upon the apparent necessity of leaving men to take some care of themselves in their business transactions, the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself." (1 Par. on Con. 578.)

The second instruction asked by plaintiff and given by the court is unobjectionable.

The judgment of the district court is affirmed.

¹ GETTY ET AL. V. DEVLIN ET AL.

(70 New York, 504. Court of Appeals, 1877.)

²**Sellers pretending to be buyers.** Owners of land who procure a sale by falsely pretending that they are joint purchasers with others, all subscribers to a common scheme, are liable in equity to account to the real purchasers for the profits realized by the sale over and above the original cost.

Decoy subscription—Parties to bill for accounting. Where such sale was effected by the owners joining with others as common subscribers, the owners marking their own subscriptions and certain decoy subscriptions as paid, while in fact the only money really paid was by the subscribers who were ignorant of the facts, it was *held*, that all the subscribers were proper parties to the suit for an accounting; and that the

¹ Same case on former appeal, 7 M. R. 29.

² *Jackson v. Allen*, 7 M. R. 127; *Ferguson v. Hillman*, 55 Wis. 181.

action in the name of two of the *bona fide* subscribers in their own right and as assignees of other *bona fide* subscribers against the owners of the property and all the other subscribers, both *bona fide* and fictitious, as defendants, should be sustained; but that if the claim were to recover the gross amount paid by the subscribers there would be a misjoinder.

Associates in fraud liable for each other's receipts. One of the owners having received all the subscription money and divided it among his associates, it was *held*, that his legal representatives were liable, not only for the proportionate share retained by him, but for that distributed among his associates.

These are cross-appeals by plaintiffs and by defendants, the executors of Daniel Devlin, deceased, affirming a judgment in favor of plaintiffs and certain of the defendants of the General Term of the Supreme Court in the first judicial department, entered upon a decision of the court, on trial without a jury. (Reported below, 9 Hun, 603; reported on a former appeal, 54 N. Y. 403.)

This was an action for equitable relief. The complaint alleged and the court found in substance, that prior to February 22, 1865, Daniel Devlin, deceased, whose executors are defendants herein, with defendants Bryan, Askenburgh and Atwood, were the owners of certain interests in oil lands in the State of Ohio, which had cost them the sum of \$26,200. With a view of disposing of the same at a greatly enhanced price, and in pursuance of a scheme devised for that purpose, they caused to be prepared the following instrument:

"We the undersigned, do hereby subscribe and agree to pay forthwith the amounts set opposite our names, for the purchase of property in Washington, Monroe and Athens counties, Ohio, as per memorandum annexed, being leasehold interest in 745 acres and 207 acres in fee, at the sum of one hundred and twenty-five thousand dollars (\$125,000), payments to be made to Daniel Devlin, Esquire, at Broadway Bank, trustee for the purchasers, in whose name the title to property shall be taken; said property to be put into an association for development upon such terms as the subscribers may elect after this subscription is completed.

"New York, 22d February, 1865."

Appended to which was a description of the property. Each of the owners subscribed \$5,000, but they did not intend to and did not pay their subscriptions.

The firm of R. P. Getty, composed of the present plaintiffs, subscribed \$5,000. The firm of J. E. Amelung & Sons, the members of which were formerly plaintiffs, subscribed \$5,000, and James H. Holcomb, formerly a plaintiff, subscribed \$5,000. The present plaintiffs having purchased the claims of their co-plaintiffs, the action was, by order of the court, continued in their names. The plaintiffs and their assignors were induced to sign the agreement partly by representations that the premises had cost \$125,000, and by the fact that Devlin and his associates had signed in the character of co-purchasers, they not being informed and being ignorant of the facts. Various other persons, who were also made defendants, subscribed, some of them in good faith, others at the suggestion of the devisers of the scheme, without any intent on their part of paying their subscriptions, and who did not pay. Plaintiffs, their assignors, and the other *bona fide* subscribers, believing the other subscriptions to have been made in good faith, paid their subscriptions to Devlin, who divided the same with his associates, he retaining \$17,500.

In March, 1865, a meeting of the subscribers was had, and steps taken to organize a corporation, which was subsequently organized under the name of the Federal Oil and Coal Company, with a nominal capital of \$1,000,000, divided into shares of ten dollars each. The property was conveyed to the company for the capital stock, which was transferred to Devlin in trust for the subscribers. Of the stock, 20,000 shares was reserved for working capital, and the balance distributed among the subscribers, fictitious as well as *bona fide*, in proportion to the sums subscribed by each. After discovery of the fraud, plaintiffs and their assignors executed and delivered to the executors of Devlin (he having died before such discovery) releases of the shares of stock transferred to them, and demanded repayment of their subscriptions.

As conclusions of law, the court found that the executors of Devlin and his three associates were chargeable with the amounts paid by the plaintiffs and their assignors, and others of the *bona fide* subscribers, less their proportionate share of the actual cost of the property.

The defendants who were sought to be charged, demurred to the complaint, upon the ground of misjoinder of parties,

plaintiffs and defendants, and misjoinder of cause of action. The demurrer was overruled. Judgment was entered in accordance with the findings.

Further facts appear in the opinion.

F. N. BANGS for the plaintiffs. There is no misjoinder of parties or causes of action: *Tradesman's Bank v. Merritt*, 1 Paige, 302; *Hallett v. Hallett*, 2 Id. 15; *Bailey v. Inglec*, Id. 278; *Robinson v. Smith*, 3 Id. 231; *Clarkson v. DePeyster*, Id. 320; *Bailey v. Burton*, 3 Wend. 339; *Dean v. Chamberlain*, 6 Duer, 691; *Simar v. Canaday*, 53 N. Y. 305. Whether Daniel Devlin personally perpetrated any actual fraud or not, it was competent to show that plaintiffs had been induced by the fraud of others, to place money in his hands, for which he gave no equivalent: *Bridgman v. Green*, 2 Vesey, 627; *Leslie v. Wiley*, 47 N. Y. 650; *Van Alen v. Am. Bank*, 52 Id. 1; *Life Insurance Co. v. Minch*, 53 Id. 144; *Disbrow v. Mills*, 1 Hun, 132; *Beecher v. Gillespie*, 6 Bened. 356; *Seymour v. Wilson*, 14 N. Y. 570; *Getty v. Devlin*, 54 Id. 411; *R. R. Co. v. Boody*, 56 Id. 461; *Blake v. R. R. Co.*, Id. 491; *Hitchens v. Cosgrove*, 4 Russ. 562; *Conybeare v. N. B. L. Co.*, 1 DeG. F & J. 578; *Blake's Case*, 34 Beav. 639; *Rex v. Barnard*, 7 C. & P. 784; *Foss v. Hurbottle*, 2 Hare, 461; *Rollins v. Wickham*, 3 DeG. & J. 304; *McLanahan v. Ins. Co.*, 1 Pet. 185; *Peter v. Wright*, 6 Ind. 183. Devlin and his executors were liable to account to plaintiffs: *Duval v. Covenhoven*, 4 Wend. 565; *McCrea v. Purmort*, 16 Id. 450; *Dias v. Brunell*, 24 Id. 9; *N. Y. Ins. Co. v. Roulet*, Id. 505; *Curtis v. Smith*, 6 Blatch. 543; *Sortore v. Scott*, 6 Lans. 276; *Dill v. McGehee*, 34 Ga. 438; *Perry on Trusts*, § 166; *Mayne v. Griswold*, 3 Sandf. 463; *Flagg v. Mann*, 3 Sumn. 186; *Penneman v. Munson*, 26 Vt. 164 (2 R. S. 113, §§ 2, 3, 5.) Plaintiffs were entitled to recover the whole amount of their own subscriptions and those of their assignors: *Conkey v. Bond*, 36 N. Y. 428; *Cleveland v. Pollard*, 37 Ala. 556. The contract was rescindable for non-performance: *Lawrence v. Van Deventer*, 51 N. Y. 676; *Mason v. Bovet*, 1 Den. 69; *Gray v. N. Y. & S. O. Co.*, 3 Hun, 392; *Himmond v. Pennock*, 61 N. Y. 145; 43 Id. 452; 55 Id. 211; *Horner v. Hanks*, 22 Ark. 572.

JOHN E. DEVELIN, for the defendants. The gravamen of the action was fraud, and not a violated contract: 54 N. Y. 412, 413, 416; *Degraw v. Elmore*, 50 Id. 1; *Ross v. Mather*, 51 Id. 108; *Barnes v. Quigley*, 59 Id. 265; *Price v. Keyes*, 62 Id. 378, 382; *Cobb v. Hatfield*, 46 Id. 533; *Masson v. Bovet*, 1 Den. 69. There was a misjoinder of parties plaintiff: 1 Chit. Pldgs., 11-17; *Jones v. Felch*, 3 Bosw. 63; *Wood v. Perry*, 1 Barb. 114; *Mead v. Mali*, 15 How. 347; *Calkins v. Smith*, 48 N. Y. 614; *Allen v. City of Buffalo*, 38 Id. 280; *Day v. Potter*, 9 Paige, 645; *Arthur v. Griswold*, 60 N. Y. 145; Code, § 119. The action could only be maintained and the judgment upheld on the ground of a joint liability on the part of the defendants: 1 Chit. Pldgs., 97-8; *Graham's Pr.*, 62; *Buckman v. Brett*, 35 Barb. 596; *Boyce v. Brown*, 7 Id. 80; *Un. Bk. v. Mott*, 27 N. Y. 636; *Gere v. Clarke*, 6 Hill, 350; *Voorhis v. Childs*, 17 N. Y. 354; *Richter v. Poppenhausen*, 42 Id. 373; *Getty v. Binsse*, 49 Id. 385; *Lawrence v. Trustees, etc.*, 2 Den. 577; *Bloodgood v. Bruen*, 8 N. Y. 371. The cause of action was not assignable: *Zabriskie v. Smith*, 13 N. Y. 322; *People v. Tioga C. P.*, 19 Wend. 75; *O'Donnel v. Seybert*, 13 S. & R. 54-56; *Shoemaker v. Keely*, 2 Dal. 213. The parties to the agreement not being copartners can not sustain any action in equity against the executors for a partnership accounting: *Salter v. Ham*, 31 N. Y. 321; Story on Part., §§ 81-91; 3 Kent's Com., 25; *Porter v. McClure*, 15 Wend. 192; *Sage v. Sherman*, 2 N. Y. 427; *Chester v. Dickerson*, 54 Id. 1. There being a plain, complete and adequate remedy at law, an action of an equitable nature could not be maintained: *Lynch v. Willard*, 6 J. Ch. 343; *Minturn v. F. L. & T. Co.*, 3 N. Y. 498; *Livingston v. Harris*, 11 Wend. 336; *Perrine v. Striker*, 7 Paige, 602; *Allerton v. Belden*, 49 N. Y. 373, 377; *Bradley v. Bosley*, 1 Barb. Ch. 125; *Shepard v. Sandford*, 3 Id. 127; *Brookman v. Hamill*, 46 N. Y. 636. Devlin was not such a trustee as would bring him within the equitable jurisdiction of the court: 4 Kent's Com. 305; *F. L. & T. Co. v. Carroll*, 5 Barb. 643; *Fisher v. Fields*, 10 J. R. 506; *Johnson v. Fleet*, 14 Wend. 176. Plaintiffs having known the facts before the consummation of the transaction, and then afterward continuing and completing it, waived the *damnum* and have no

cause of action: *Sar. & S. R. R. Co. v. Row*, 24 Wend. 74; *Minturn v. Main*, 7 N. Y. 220; *Bruce v. Davenport*, 3 Keyes, 472.

RAPALLO, J.

The general question of the rights of the plaintiffs to recover in this action against the executors of Devlin and against the defendants, Bryan, Askenburgh and Atwood, was decided by the commission of appeals when the case was before that tribunal on the plaintiffs' appeal: 54 N. Y. 403. The only parties now appealing are the executors, and the leading facts are substantially the same as recited in the opinion of the court on the former appeal. We do not propose to review that decision, and it must stand as the law of the case.

The commission of appeals then held, in substance, that Devlin and the three other defendants named, by signing and issuing the subscription agreement, dated February 22, 1865, held out to those to whom it should be exhibited for the purpose of inducing them to become subscribers, that they designed to become joint purchasers, with those who should unite in the agreement, of the lands and leasehold estates described in the list annexed, at the price of \$125,000. That Devlin undertook to receive the sums subscribed as trustee for the purpose of applying them to the payment of the purchase money. That under these circumstances the four defendants named occupied such a relation to the persons who in good faith agreed to unite with them in the purchase on the terms proposed, as precluded them from making a profit out of their associates by being themselves the vendors of the property, which they had acquired for a much smaller sum than \$125,000; and that they were bound to account to those who, in ignorance of the facts, had subscribed and paid in their contributions on that basis, for the profits made by the purchase of the property and its sale to the joint concern.

Daniel Devlin, whose executors are the only appellants, received the whole sum paid in by *bona fide* subscribers upon the trust expressed in the agreement of February 22, 1865, to take the title of the property in his own name for the benefit of the purchasers, and put it into an association for develop-

ment upon such terms as the subscribers might elect after the subscription should be completed. At this time he was the owner of one half interest in the leasehold property which he had purchased of the defendant, Bryan, for \$8,125. He headed the subscription list appended to the agreement, with his own signature for \$5,000, although, as found by the court; he did not at the time of signing intend to pay his subscription, or any sum, toward the purchase of the property, and the sums received by him from *bona fide* subscribers he paid over to the defendants, Bryan and Askenburgh and Bryan, less the sum of \$17,500, which he retained to his own use.

The findings sufficiently show that Devlin, at the time of receiving the payment of these subscriptions and paying them over, was aware of the facts relating to the purchase of the property, and that he did not disclose them to the parties who paid their subscriptions, and it is expressly found that the intent and design of Devlin, Bryan and Askenburgh in signing and acting under the agreement of February 22, 1865, was to effect a sale of the property therein described, at a profit to themselves in excess of the profits which would be realized by the other subscribers, and that in collecting the payments of money under the agreement it was their intent and design to distribute the same among themselves and the defendant Atwood, as sellers of the property at a profit, which intent they concealed from the plaintiffs and other subscribers.

It is also found that the actual cost of the property to the defendants, Devlin, Askenburgh and Bryan, up to February 22, 1865, was \$26,200. The details of the representations by which various parties were induced to subscribe, of the amounts paid in, and of their distribution, etc., and of the conversion of the property into the stock of an incorporated company, and its distribution, etc., are set forth in the findings; but it is not necessary to repeat them here.

There can be no doubt of the liability of the parties thus selling their own property to their associates to account to them, at least, for the profits made by such sale, nor that such an accounting is a proper subject for the cognizance of a court of equity. In this view of the case the demurrer to the complaint was properly overruled. The complaint certainly set forth a cause of action, and the objection to the joinder of

parties and causes of action were not well founded. Devlin, the trustee of the fund, was clearly liable to refund to his associates in their due proportion, the profits he had himself realized, and he was also liable for the misappropriation of so much of the fund as he had paid over to those privately interested with him in excess of the actual cost of the property. An accounting was necessary for the purpose of ascertaining the amount of profits to be refunded, and the proportion payable to each *bona fide* subscriber, and to such an accounting it was proper that every person interested in the result, whether as liable to pay or entitled to participate, should be a party. The judgment at special term proceeded upon this basis, and while it held the estate of Devlin primarily liable to the innocent subscribers to redistribute the fund received by him on equitable principles, it also adjusted the equities between the estate of those who had participated with the testator in the profits which were to be refunded. The defendants certainly have no right to complain of this result, which merely compels them to refund the profits they have obtained. The most serious question is that which arises on the appeal of the plaintiffs. They claim that they were entitled to recover the whole amount paid in by them and their assignors, and that the defendants against whom a recovery has been had were not entitled to any reduction on account of the original cost to them of the property. We have considered the case in this aspect, and while acknowledging the force of the argument that the plaintiffs were entitled to rescind the contract of February 22, 1865, and recover back what they had paid upon it, find difficulties in the way of so modifying the judgment as to enforce that right in the present action. If the action were simply to rescind the contract of February 22, and recover back the payments, it might be subject to the objections raised by the demurrer, and other difficulties would arise in sustaining the present judgment. We think that substantial justice has been done by the judgment as it stands.

The judgment in favor of the plaintiffs for the interest in the fund assigned to them by the former plaintiffs, Amelung and Holcomb, was, we think, correct. There can be no doubt that such an interest is assignable. We also think that the

judgment in favor of the defendant Donnelly, and the defendants Henffer and Toel, should be sustained, on the grounds stated in the opinions at general term.

The judgment should be affirmed on all the appeals, without costs as between the plaintiffs and the executors of Devlin, and with costs to the defendants Donnelly, Henffer and Toel, against the executors, payable *de bonis*, etc.

All concur.

Judgment affirmed.

JACKSON ET UX. V. ALLEN.

(4 Colorado, 263. Supreme Court, 1878.)

¹ **Agent dealing on two contracts—one on which to sell, the other on which to settle—Duress.** An agent for the purchase of a mine took from the owners two title bonds. One represented the terms of sale as \$1,500 cash, and \$4,000 to come out of the proceeds of working. The other called for \$4,000 cash, and \$4,000 out of the proceeds. The sale was consummated between the agent and the seller on the first bond, but the agent had procured from his principal the \$4,000 cash, representing the sale to be on the latter, and concealing the existence of the former bond. Upon discovery of the fraud he gave a secured note to his principal for an agreed balance. In the settlement the principal told him he was liable to prosecution for fraud: *Held*, that the original transaction was a fraud upon the principal; 2, that there was no duress in the settlement, and 3, that it was not a case where the court would inquire whether the precise sum mentioned in the note was the sum due.

Review of evidence in chancery case. In a suit in chancery where the evidence has been taken before a master, the appellate court will examine into the entire record, and affirm or reverse the decree of the court below upon principles of equity, as the facts will justify.

Majority of female infant. A female infant, by statute of Colorado, attains her majority at eighteen, and at that age she may execute a promissory note.

Appeal from District Court of Arapahoe County.

The facts are sufficiently stated in the opinion.

Mr. S. P. ROSE and Mr. E. P. HARMAN, for appellants.

¹ *Collins v. Case*, 1 M. R. 91; *Norris v. Tayloe*, 1 M. R. 383.

MESSRS. WELLS, SMITH & MACON, for appellee.

THATCHER, C. J.

The bill in this case, which was dismissed in the court below, seeks to restrain the negotiation and prays for the cancellation of two certain promissory notes made by the complainants to the defendant. The chief grounds relied upon are the alleged want of consideration, and that their execution was procured by fraud and duress practiced by the defendant. There is no evidence tending to show, however remotely, that Cora E. Jackson was coerced into the signing of the notes. At the request of her husband, she voluntarily joined in their execution. Mr. Jackson comes into a court of equity with unclean hands, convicted by his own evidence of a deliberate attempt to defraud the appellee. For the good name of Colorado it is to be earnestly hoped that an attempt to justify fraudulent practices by pleading the custom of the country will never receive the sanction of any of our judicial tribunals.

The appellee, and one George Allen, during a visit to Boulder in July, 1875, examined "Victoria Lode No. 2," and were well pleased with it. In an interview with Frank P. Jackson he proposed to the appellee and George Allen that they three should purchase the mine jointly. This proposition was acceded to. Upon the representation of Jackson that he could more advantageously negotiate the purchase of the mine, he was authorized to buy for their joint benefit at any sum not exceeding \$4,500 in all, and not requiring a cash payment at the time of purchase exceeding \$4,000. Jackson, for a purpose which subsequent events make plain, took two bonds for deeds from the owners of the mine, "one of said bonds (to follow the allegations of the bill) being for the sum of fifteen hundred dollars (\$1,500) cash, and four thousand dollars to be paid out of the net proceeds of the mine, and the other calling for four thousand dollars (\$4,000) cash, and four thousand dollars in the net proceeds of the mine." The *last mentioned* bond was shown to George Allen secretly, and without the knowledge of either George Allen or appellee as to the price paid, the purchase had been made by Jackson on the basis named in the first bond, viz.: \$1,500 cash in hand,

and \$1,000 additional to be paid out of net proceeds. Jackson drew a check for \$4,000 on First National Bank of Denver, payable to the order of J. W. Corser (one of the mine owners), and to be charged to the account of Harrison Allen. This check was indorsed both by Corser and Jackson, and dated July 22, 1875. On presentation, the check was cashed by the bank out of the funds of appellee, and \$1,500 of the amount were paid by Jackson to the owners of the mine, being the only cash payment required. Jackson had the deed of the entire mine made to himself, and he conveyed two thirds thereof to the two Allens. Jackson concealed from appellee the fact that he had made a cash payment of only \$1,500, and represented that he had no money with which to pay one third of the total alleged consideration which appellee had advanced for his benefit, but that he expected to receive the money in a few days from Pittsburgh, Pa. He then gave his note to appellee payable in seven days for \$1,333.33. August 2, 1875, Jackson made a payment on this note of \$1,200, stating at the same time that he would pay the balance as soon as possible.

It is fairly deducible from the evidence that this payment was made out of his ill-gotten gains. Here was an evident attempt to defraud appellee out of \$2,500. But Jackson alleges in his bill, and testifies at the hearing, that to enable him to consummate the purchase of the mine, it was necessary to call in one J. B. Shaw, a mining broker, to aid in the negotiations, and that he paid Shaw \$500 for his services, for which he, Jackson, claims a credit. Shaw was not put upon the stand. If \$500 were in fact paid him for his services in aiding to concoct, carry out, and conceal a perfidious scheme, the ultimate purpose of which was to defraud the appellee, we are aware of no principle of equity that will require the defrauded Allen to reimburse Jackson the amount he paid out to his partner in guilt. If, as counsel for appellant contends, it be conceded that the employment of Shaw by Jackson was for a legitimate purpose, it does not appear that appellee had authorized such employment or the paying out of commissions, nor was the employment subsequently ratified. Indeed the evidence conclusively shows that the fact of such alleged

employment was for about five months carefully concealed from appellee.

At the time the mine was bought the former owners agreed to sink the shaft twenty feet deeper than it then was, and to timber it, Jackson to furnish the lumber, and they further agreed to run a tunnel one hundred feet on the lode. For their work they were to receive \$1,400. When the work was completed, Jackson paid the former owners of the mine \$1,400, as per contract. Of this sum, on account of the development of the mine, and before Jackson's fraud was discovered, appellee paid by draft August 26, 1875, \$100, and by draft September 29, 1875, \$625.

Jackson claims a credit on account of services as superintendent of the mine. The evidence we think does not justify the claim. Appellee's testimony is to the effect that for his services as superintendent he was to receive \$4 per day, payable out of the ore on the dump. Jackson testifies that he was to be paid for his services without regard to the value of the ore. McPherson testifies that he (Jackson) never superintended the work on the mine, "but was out prospecting and looking after a contract he had let on the Standard lode." The evidence convincingly shows that Jackson hauled away and appropriated quantities of the best ore, of which he made no account or return.

Jackson alleges in his sworn bill, and testifies at the hearing, that for his one third interest in the mine, he gave appellee his note for \$1,200. He swears that nothing was said about the balance, \$133.33, by appellee, and further, that he paid the whole amount due on the note about a week afterward.

Appellee's testimony is in direct conflict with Jackson's testimony on this point. Not only does appellee testify that the note was for \$1,333.33, that but \$1,200 had been paid on it and indorsed as a credit, but by the production of the note itself, the evidence of appellee is corroborated. That the court below did not give full credence to the evidence of Jackson, some parts of which were intrinsically improbable, and other parts of which were proved to be absolutely, and we think, willfully false, is no ground of error. To believe the evidence of Jackson upon any point, unless corroborated, is a

tax upon human credulity. It appears from his own testimony that both by language and conduct, he uttered and acted falsehoods in all his transactions with appellee. In addition to this, as we have before seen, the falsity of some of his testimony on material points at the hearing, was established by indubitable proof.

Appellee, having learned, Dec. 18, 1875, of one of the former owners of the mine, that but \$1,500 cash had been paid therefor, confronted Jackson in his office at Denver two days later, and demanded an explanation. Jackson confessed the fraud, but attempted to excuse himself by saying "That's the way we do business here." He further said he thought the mine would pay from the grass roots; that he aimed to get his interest free of cost; that he was hard up; that he wished first to get the \$2,500 in his own hands, and that when the mine would pay he would return it. After being detected he offered to make reparation as far as possible. Appellee testified: "Jackson made his own figuring, and in adjusting the difference between us, in settlement of the work in the mine and the money wrongfully taken from me, said there was \$2,000 in justice due me, and asked me to take his note, which proposition I accepted, and we then settled accounts. I took his receipt in full and his note for \$2,000 in six months, at eighteen per cent. interest. I told him he was liable to prosecution for fraud, but that I had no desire to prosecute or injure him—simply wanted my money." This statement is substantially corroborated by Gaylord C. Allen, who was present at the interview and settlement. Considering the evidence adduced at the hearing as a whole, we can not say that the *precise* sum then due was \$2,000, but it approximated it, and the parties settled upon that basis. Sufficient appears to show that the note was not without consideration, and although Jackson testified that the note was executed under threats of criminal prosecution, and without consideration, the preponderance of credible evidence, as we weigh it, does not support that view. The reconveyance of one third interest in the mine by Jackson to appellee, we are impelled to conclude was made as security for advances to be made by appellee in the future development of the mine, Jackson then being without funds to contribute for that purpose. In fulfillment of this

agreement to advance funds, appellee has already expended between \$800 and \$900.

The validity of the \$2,000 note Jackson subsequently acknowledged, and promised that the same should be paid when due. It certainly can not be claimed that he was then under duress. Appellee having learned that Jackson, with a view to avoid the payment of the note, had transferred all his property to his wife, requested him to secure him. A check for \$180, which had been given by Jackson to appellee on account of accrued interest, had been dishonored by the bank. There were then due on note and check \$2,240. Appellee surrendered both note and check, and received in lieu thereof two notes executed by Jackson and wife, one for \$1,000, due in one year, and one for \$1,240, due in two years, with ten per cent. interest per annum. As to whether, in this last transaction, threats of criminal prosecution were made, there is oath against oath, and even if Jackson was equally credible, under the ordinary rule, the burden of proof being with him, his case is not made out. In a chancery proceeding where the evidence was taken by a master, an appellate court will not sustain the decree of the court below, merely on the ground that it is not unsupported by evidence; but will examine the entire record, sift all the evidence adduced, with the view of arriving at the truth. We can only weigh the evidence. The witnesses neither appeared before the court below nor before this court. Their manner of testifying and their appearance upon the stand may be considered by a jury, or, when the trial is to the court, by the court. But here there was no such opportunity.

Carefully weighing all the evidence in the light of the rules laid down by the authorities for testing its value, we are constrained to the conclusion that the decree of the court below is justified by the facts and founded upon principles of equity.

It is insisted, however, that as Cora E. Jackson was not twenty-one years of age when she signed the notes, that she was not bound thereby. Under our laws a female attains her majority at eighteen years of age: R. S., p. 348, § 8; *Stevenson v. Westfall*, 18 Ill. 209. This objection is, therefore, without force.

The decree of the district court is

Affirmed.

¹ General Stats. § 1592.

MAHONY MINING CO. V. BENNETT.

(5 Sawyer, 141. U. S. Circuit Court, District of California, 1878.)

¹**Cancellation of fraudulent corporate lease.** Where the directors of a mining corporation made a lease of the mines of the company to a nominal party acting in the interest of a minority of the stockholders, for the purpose of securing control of the property, and to take it out of the reach of the new board about to be elected: *Held*, upon bill filed by the corporation, that the lease should be canceled.

Bill in equity to set aside a lease of mines on the ground of fraud.

McALISTERS & BERWIN, STEWART, VAN CLIEF and HERRIN,
for complainant.

S. HEYDENFELDT and WM. H. SHARP, for defendants.

SAWYER, Circuit Judge.

This case was argued very thoroughly, and the testimony was very fully read on the hearing. It is a bill in chancery to set aside a lease of a mine for three years, with an option to purchase at the price of two hundred and fifty thousand dollars within that period. The ground alleged is that this lease was made, not in the due and proper course of the business of the corporation, but by a conspiracy, in fraud of the rights of the majority, and in the interest of the minority, of the stockholders. The bill is filed to cancel the lease on that ground.

Testimony has been introduced and arguments have been made with reference to the irregularity of the election of both the boards of directors claiming to represent the corporation; but I do not find it necessary, in the view I take of the case, to decide as to the ultimate validity of those elections; and I shall assume, for the purposes of the decision, that the election of the first board of directors, by whom the lease was made, was valid. The result of that election is only important, in the view I take, so far as it bears upon the question

[¹ *Meeker v. Winthrop Iron Co.*, 17 Fed. 48.

as to the purpose for which this lease was made. There are certainly some irregularities in it, and some extraordinary circumstances connected with that transaction. Nevertheless, I shall consider those in this case only as indicating the motives of the actors, and their bearing upon the validity, or legal propriety, of this lease.

The mine seems to have been worked without any difficulty up to a certain time in April, 1877. The two principal stockholders owned fifty-two hundred shares each, and there were sixteen hundred shares outstanding, belonging to Sharon, Bell, Sunderland and Flood & O'Brien. One of the directors—the director who, as I understand it, represented the interests of Sharon, Bell, Sunderland and Flood & O'Brien—resigned; and the remaining directors called a meeting of the stockholders for the purpose of electing a new board of directors. This meeting was called apparently in the interest of the Seligmans—one of the two large stockholders. The other large stockholder, Stewart, owning an equal number of shares with the Seligmans, was at the time temporarily absent on business in New York, and was not notified of the calling of the meeting of the stockholders. A thousand shares of the stock of the company, owned by Sharon, Bell and Flood & O'Brien, stood in the name of one Bush, as trustee, and were voted at that meeting by him without the knowledge or consent of the owners, who were in the city at the time; and neither Sharon nor Bell was aware that his stock had ever been issued, and neither had notice of the calling of the meeting. These shares were required to constitute a majority of the stock.

At that meeting a new board of directors was elected, most of them, apparently, being merely nominal owners of stock, holding a few shares in order to qualify them to act as directors. The meeting seems to have been organized and the new directors elected under the management of Benjamin, acting in the interest of the Seligmans; at all events, these directors were elected to control the corporation; and, for the purposes of this decision, I shall assume that they had authority to act as directors in the usual business of the corporation.

When Stewart returned to the city within a few days after and ascertained what had been done, there was dissatisfaction

and some discussion over the matter. Previous to this time there had been no meeting of the stockholders or election of directors since the first board was elected, three or four years before; and as the by-laws of the corporation contained no provision for the calling of an annual meeting, the statute provides that, in such a case, the time of meeting shall be the first Tuesday in June: Civil Code, Sec. 302. In case no meeting is called by the board at the time appointed by law, one half of the stockholders are authorized to call one: Civil Code, Secs. 310, 314. The extraordinary meeting was held on May 1st, a few days only over a month prior to the time appointed by the statute for the annual meeting. Stewart, upon ascertaining the condition of things—that the one thousand shares of Sharon and Bell and others had been voted without their knowledge and consent—bought up these outstanding shares before the first of June, and immediately notified all the stockholders and the directors of the calling of a stockholders' meeting in June, in the mode designated by the statute. Immediately on receiving that notice, the directors elected on the first of May, met on the first of June, and without having previously had any consultation in regard to the matter, Benjamin, representing the Seligmans, being the active party, it was proposed to make a lease of the property to one Bennett, a brother-in-law of Benjamin; and the board passed a resolution authorizing the making of the lease, and the lease was thereupon made—the lease in question here. All this was accomplished before and on the fifth of June.

Now the question is as to the purpose of that lease. It is claimed on the one side that it was made in good faith, in the interest of all the stockholders; and on the other side it is claimed that it is a mere sham, gotten up for the purpose of keeping the control of the mine from passing into the hands of the majority of the stockholders in case they should elect a new board of directors at the meeting called in June. It is admitted by the principal witnesses, and by the ones particularly active in the matter, that that was one of the purposes of the lease. It is so stated in their testimony, and I think no one can read that testimony without being satisfied that that was the moving and controlling purpose of this lease. It is very manifest, to my mind, that Bennett was not the real

lessee, but was a mere instrument in the hands of Benjamin, acting in the interest of the minority of the stockholders at that time. Bennett was a man not likely to take such a lease, having no sufficient means with which to carry on such an undertaking, and not being a man of experience in mining, or a person whom business men of ordinary judgment and prudence would be likely to intrust with such an enterprise. From the testimony, it appears manifest to my mind that the money paid out by him, after assuming control of the mine, was furnished by other parties, and not by Bennett; that Benjamin was still the active and controlling man as before. It is impossible, it seems to me, after reading the testimony in the case, to come to the conclusion that the transaction was really a *bona fide* lease to Bennett, for his own purposes. Bennett was but the instrument, the shadow of the real parties seeking to withdraw the control of the mine from the board of directors about to be elected by the majority of the stockholders.

Now it may well be that in making such a lease the parties representing the minority may have believed that the interest of all the stockholders was advanced; but in this case, where this lease is given with an option to purchase the mine for two hundred and fifty thousand dollars, it is certainly a remarkable fact that the man who was active in the matter should have been Benjamin, both before and after the lease. Manifestly, the controlling purpose was to circumvent the other stockholders, who were seeking, at the proper time and in the mode appointed by the statute, to elect a new board of directors, and to put the mine beyond their reach and control, in order that the Seligmans might control it according to their own ideas of what was right and proper. Whether or not this was, as the complainant insists, intended as a fraud, the manifest operation of the proceeding, if consummated, would be to work a fraud upon the rights of a majority of the stockholders. Upon that ground I think the lease was not made in the due and regular course of business of the corporation, or for any legitimate purpose. It was made for the purpose of diverting the mine into the control of the minority of the stockholders against the opposition of the majority, without any representation on the part of the majority, in case the majority should succeed in establishing their control of the corpora-

tion—should elect a new board of directors at the coming meeting.

It is said that this new election was void, and that the acts of the new board of directors are not the acts of the corporation. The new board was elected by a majority of the stockholders at a meeting held at a time and in the manner authorized by law, and a State court has decided that election to be valid; and although there is an appeal pending, that judgment is still unreversed. At all events, the new board is in active control, and, as I understand it, in possession of the books, etc., of the corporation; and its members are now, and were at the time, *de facto*, acting as directors.

As to the management of the mine, we have nothing to do with that here. Upon the vacation of the lease, the mine, as it should be, will be subject to the control of the legal board of directors, whoever they may be. The new members were doubtless all elected in the interest of those opposed to the Seligmans, as the old ones were in their favor. But we have nothing to do with that in this suit. I have disposed of the only question involved in the case, in determining that this lease was made for an unlawful purpose—for the purpose of taking the mine out of the control of those who were to succeed in the management of the mine, should an election be lawfully held in pursuance of notice already given; a purpose which, in my judgment, renders the lease an unlawful exercise of the powers assumed and exercised by those parties by whom it was made, and therefore that it should be canceled.

Let a decree be entered canceling the lease, in pursuance of the prayer of the bill, and making the preliminary injunction issued perpetual.

HICKS ET UX. V. JENNINGS.

(4 Fed. Rep. 855. U. S. Circuit Court, N. D. Georgia, 1880.)

¹ **Defense of fraud where land was sold in parcels.** Several tracts of mining land were sold under one contract, but separate deeds naming distinct considerations were given for each tract. *Held*, that fraud and want of consideration in the sale of one tract could be set up as a defense in a suit to foreclose a purchase money mortgage upon another of such tracts.

² **Defense runs against heirs.** And that such defense could be set up against the heirs and distributees of the mortgagor where such mortgage had been transferred to them as an advancement.

Donee of note. A donee takes a note subject to equitable defenses.

In Equity.

The purpose of this suit is to foreclose a mortgage executed by the defendant to one Henry Irby, now deceased, dated May 7, 1877, on certain lots of land in Hall county, Georgia, known as the "Glade Mines" and containing 2,000 acres, to secure a note, dated the said May 7, 1877, made by said Jennings and payable to said Irby, for \$10,000, and falling due January 1, 1879. The note recited on its face that it was given for part of the purchase price of the Glade mines, in Hall county, Georgia. Upon this note the defendant paid, on December 31, 1878, the sum of \$5,000 principal, and all the interest due up to that date; and, by an indorsement made on the mortgage by the payee of said note, the time for the payment of the note was extended to January 1, 1880. The bill alleged that in January, 1879, Henry Irby, the payee of said note, assigned said note and mortgage to the complainant, Royal B. Hicks, and delivered the same to the complainant, Sarah Jane Hicks, who was his daughter, as an advancement to her out of his estate, and the same was then and there accepted by her as such; that on February 20, 1879, said Henry Irby departed this life, and afterward on April 7, 1879, John F. Irby, who was a son, and C. L. Walker, who was a son-in-law of said Henry Irby, for the purpose of carrying out the wishes of said Henry Irby in reference to said note, signed a

¹ *Coos Bay Co. v. Crocker*, 6 Saw. 574.

² *Lathrop v. Pollard*, 6 Colo. 424.

transfer of all their interest in the same to complainant, Royal B. Hicks, and authorized him to receive the money due on the same. The consideration of this transfer by John F. Irby and Walker, was an agreement on the part of Sarah Jane Hicks to accept said note as an advancement, and account for the same in a final settlement of Henry Irby's estate; and the complainants, Hicks and wife, agreed to pay over to John F. Irby and to O. L. Walker, for his wife, Agnes Walker, \$10,000 belonging to the estate of Henry Irby, then on deposit in a bank in the city of Atlanta. On this sum \$5,000 was actually paid on July 18, 1879.

The defense relied on is stated substantially as follows: On April 27, 1877, the defendant entered into a contract in writing with the said Henry Irby for the purchase of certain mining lands in Georgia, then owned by said Irby. There were two tracts in Hall county, known respectively as the Glade mines and Chapinan mines, each containing 1,000 acres and lying contiguous to each other, and all designated as the Glade mines in said contract, and lot No. 133 of the 17th District, in Fulton county, Georgia. For these lands the defendant, Jennings, agreed to pay the sum of \$30,000 as follows: \$10,000 on the delivery of deeds; \$5,000 on July 1, 1877; \$5,000 on January 1, 1878; and the remaining \$10,000 at any time during the year 1878; and for that part of the purchase money which was unpaid, a mortgage was to be given on the Glade mines. When deeds were made by Henry Irby to Jennings for those lands, in pursuance of this contract, the parties required that the purchase money should be divided into three parts, \$10,000 for the Glade mines, and the like sum, each, for the Chapman mines, and for lot No. 133 in Fulton county. Three separate deeds were made, two for the Hall county lands, and one for lot 133 in Fulton county. \$10,000 was paid by Jennings to Irby on the delivery of the deeds, and a mortgage given on the Hall county lands to secure the residue of the purchase money, which was evidenced by two notes for \$5,000 each, and one note for \$10,000. The two \$5,000 notes were paid at or before maturity, and a payment was made on the \$10,000 note of \$5,000 and all interest up to January 1, 1879.

The defendant alleges that in the treaty for the purchase of

these lands Henry Irby represented that the said lot 133, in Fulton county, contained a valuable silver mine, and was worth \$15,000 or \$20,000, and that upon the strength of these assurances he agreed to give, without any examination of the Fulton county lands, \$30,000 for the three tracts of land, estimating lot 133 as worth at least \$10,000, and believing it to be worth \$15,000; and that he would not have purchased said lot 133 in Fulton county or the said Hall county lands, but for the statements of said Henry Irby in reference to the value of said lot 133. He declares that he relied implicitly on the representations of Irby in relation to said lot 133, and had no opportunity to examine the same. Said lot was about 70 miles distant from the place where the contract of purchase was made.

The defendant says that all the statements of said Irby in reference to the value of said lot 133 were false, and Irby knew them to be false when he made them; that, so far from its being true that said lot contained a valuable silver mine, there was not a trace of silver or other precious metal to be found upon said land, and, so far from its being worth \$15,000 or \$20,000, it was not worth more than three dollars an acre—in the aggregate about \$600; and he claims that thence, by reason of said fraud, there should be no decree for complainants on said note and mortgage.

D. F. HAMMOND and W. R. HAMMOND, for complainants.

J. B. ESTES, CLAUD ESTES and L. J. GARTELL, for defendant.

WOODS C. J.

The evidence leaves no doubt that Henry Irby, in his treaty with Jennings for a sale of the lands mentioned in the answer of defendant, fraudulently misrepresented the value of lot 133, in Fulton county. The fact that a careful examination of the lot, and an assay of ores found upon it, shows that not a trace of any precious metal exists upon it, stamps the statements made by Irby to Jennings in reference to its value, with falsehood and fraud. So far from being worth \$15,000 or \$20,000 on account of the deposits of silver to be found on it, as as-

serted by Irby, it is not worth over \$500 or \$600. Irby must have known that his representation was false, for he told Jennings that he had procured an assay of the ore taken by himself from the lot to be made, and that it proved to be rich in silver. The evidence shows that the lot 133 formed at least a third of the entire consideration given for all the lands sold by Irby to Jennings. If this suit were prosecuted by Irby, and if it were based on a note given for the purchase price of lot 133, there could be no question that the defense set up in the answer and established by the proof, showing the willful fraud and misrepresentation of Irby, ought to prevail. But this suit is for foreclosure of a mortgage, executed to secure a note, given, as expressed on its face, for the purchase money of the Glade mines; and it is prosecuted, not by Irby, but by one of his heirs, to whom he transferred the note in his lifetime, and who, at the time of the transfer and since his death, has agreed to consider it as an advancement on his share of his father's estate.

This state of the facts raises two questions:

(1) Can the fraud of Irby and the failure of the consideration in the sale of lot 133 be set up as a defense to a suit to foreclose the mortgage on another tract of land executed to secure a note given for the purchase price of that other tract? The evidence makes it clear that the purchase of the three tracts of land was one transaction. It was provided for in one instrument, and one gross sum named for all the lands which Irby agreed to convey. It is true that, in arriving at this gross sum, estimates were put on each tract, and that, when the written contract came to be executed, three separate deeds were made for the three tracts respectively and a consideration of \$10,000 named in each. The deeds were all made, the cash installment paid, and the mortgage executed at the same time. Now, if Irby himself were seeking to foreclose this mortgage, it is quite apparent that his fraud in selling lot 133 for \$10,000, which had been paid, might be set up as a defense against his recovery of the same amount as the consideration for another of the tracts sold by the same contract. In an action of law the defense might be restricted to the note sued on; but not so in a court of equity, which always looks at the substance of things, and seeks to do complete justice between the parties.

A court of equity would not allow a decree upon the note and mortgage in suit, and then turn the defendant over to another suit to recover the amount out of which he had been wronged by the fraud and falsehood of the complainant. Having the parties before it, it would adjust the controversies between them springing out of the same transaction, according to equity and good conscience; and this would be to refuse a decree on this note and mortgage in consideration of the fact that the complainant had already defrauded the defendant, in the same contract out of which the note and mortgage sprung, to an equal or greater amount. Upon the facts of the case, therefore, if Henry Irby were the complainant no decree should be made in his favor.

(2) The next question is, can the defense which the defendant could have set up against the note and mortgage, if the suit to foreclose were prosecuted by Irby, be set up against his heirs and distributees? The transfer of the note by Henry Irby in his lifetime to Sarah Jane Hicks, his daughter, was not for value; it was a mere gift. The rule is that a negotiable instrument, in order to be operative in the hands of an indorsee as against equities and defenses existing between the maker and payee, must have been taken by the indorsee for value; that is, he must have parted with something valuable therefor at the time of the transfer: *Park Bank v. Watson*, 42 N. Y. 490.

Neither Sarah Jane Hicks nor her husband, Royal B. Hicks, paid anything for the note at the time of its transfer by Henry Irby. They parted with nothing of value as a consideration for the transfer. The same defenses against the note were therefore open to the maker as if it had remained in the hands of the original payee. The agreement made between Hicks and wife, and other heirs and distributees of Irby's estate, after Irby's death, did not change the terms on which Hicks and wife had received the transfer of the note and mortgage. They agreed to consider them as an advancement, and they had received them from Henry Irby as an advancement. The contract between them and the other heirs and distributees provided that in case of any recovery against the estate of Henry Irby reducing the distributive shares of the heirs, they, the said heirs, would "refund their *pro rata* shares of such re-

covery to an extent sufficient to save indemnified and harmless the legatees of said estate, and make all parties interested therein equal." A fair construction of this contract would require, in case of a failure to collect the note in suit by reason of the defenses set up, the answer that the residue of the estate should be equally divided between all the distributees, so as to give each an equal share. In any view that may be taken, the complainants neither paid nor surrendered anything of value for the transfer of the note and mortgage. The same defenses are therefore open to the maker of the note as if the suit were prosecuted by Henry Irby in person.

The defendant, Jennings, after setting forth in his answer his defense to the case made by the bill, attempts by calling his answer an answer in the nature of a cross-bill, to make the complainant, Hicks, in his capacity of administrator of the estate of Henry Irby, a party to the original bill, and asks a decree against him as such administrator, for the \$5,000 paid upon the note and mortgage on which the suit is based, with interest. An answer in the nature of a cross-bill is authorized by the Code of Georgia, but no such pleading is recognized by the equity practice of the United States courts. If the defendant had filed a formal cross-bill he could only make either the complainants or other defendants, if any, or both parties defendant to his cross-bill. He can not introduce a new party and ask relief against him. By asking relief against Hicks, as administrator of Irby, the defendant seeks to bring into the litigation a new party, and to obtain a decree against him alone. This is not permissible. The other parties to the case are not to be involved by the filing of a cross-bill in a controversy between one of the defendants and a stranger to the original litigation, in which they have no interest, and to which they are not necessary or proper parties.

There can, therefore, be no decree in favor of the defendant against Henry Irby's administrator, as prayed for in the answer. There will be a decree dismissing the bill of complainants at their costs, and dismissing the claim of the defendant set up in his answer in the nature of a cross-bill, without prejudice to a suit upon the same by defendant against Henry Irby's administrator.

¹WARDELL V. THE UNION PACIFIC RAILROAD CO.

(103 United States, 651. Supreme Court, 1880.)

²Private interest of directors subservient to official duty. The directors of a corporation are subject to the obligations which the law imposes upon trustees and agents. They can not, therefore, with respect to the same matters, act for themselves and for it, nor occupy a position in conflict with its interests.

³Credit mobilier contract not enforced. Applying this rule, a court will refuse to give effect to arrangements by directors of a railroad company to secure, at its expense, undue advantages to themselves, by forming, as an auxiliary to it, a new company, with the understanding that they or some of them shall become stockholders in it, and then that valuable contracts shall be given to it by the railroad company, in the profits of which they, as such stockholders, shall share.

Railroad directors and the coal supply of the road. The contract between the U. P. railroad and Wardell et al., giving them the exclusive right to mine the coal on the company lands and the exclusive supply of coal to the railroad lines, which contract had been assigned to a company controlled by the directors of the railroad company: *Held*, fraudulent and void.

Appeal from the Circuit Court of the United States for the District of Nebraska.

The facts are stated in the opinion of the court.

Mr. JAMES O. BROADHEAD and Mr. JAMES M. WOOLWORTH, for the appellant.

Mr. ANDREW J. POPPLETON, for the appellee.

Mr. JUSTICE FIELD delivered the opinion of the court.

The road of the Union Pacific Railroad Company passes for its entire length, from Omaha on the Missouri River to Ogden in Utah, a distance of 1,036 miles, through a country almost destitute of timber fit for fuel. During its construction, however, large deposits of coal, of excellent quality and easily worked, were discovered in land along its line, from

¹ S. C. below, 4 Dillon, 330.

² See *Cumberland Co. v. Sherman*, 1 M. R. 322; *Simons v. Vulcan Co.*, 6 M. R. 633.

³ *Ahl's App.*, 3 M. R. 639.

which abundant supplies for the use of the company could be obtained. The complainant represents that their extent, quality and value were unknown, and that doubts were generally entertained as to their adequacy to meet the necessities of the company, until he had made explorations in June, 1868, and reported to its managers the information which he had thus acquired; and that upon that information the contract which has given rise to this suit was made, after much negotiation between the company and himself and Cyrus O. Godfrey, with whom he had become associated in business. But in this respect he is mistaken. Though he may have imparted to the managers the information acquired by his explorations, the knowledge of the existence and general character of the deposits had been communicated to them years before by the engineers appointed to survey the route for the construction of the road. They had reported that coal in inexhaustible quantities, of suitable quality for the purposes of the company, was found so near the line of the road as to render its extraction and delivery easy and convenient. It is of little moment, however, whether the knowledge of the existence, character, extent and accessibility of the deposits was obtained from the complainant or from others; it is sufficient that the directors of the Union Pacific Railroad Company, having the control and management of its roads and business, were informed upon the subject at the time the contract mentioned was made. The contract was as follows:

"This agreement, made this sixteenth day of July, in the year of our Lord one thousand eight hundred and sixty-eight, between the Union Pacific Railroad Company, by its proper officers, of the first part, and Cyrus O. Godfrey and Thomas Wardell, of the State of Missouri, or assigns, parties of the second part:

"Witnesseth, that the said party of the first part agrees that the said parties of the second part may prospect at their own expense for coal on the whole line of the Union Pacific railway, and its branches and extensions, and open and operate any mines discovered, at their own expense; that said railroad company agrees to purchase of said parties of the second part all clean, merchantable coal mined along its road needful for engines, depots, shops and other purposes of the

company, and to pay for the same the first two years at the rate of six dollars per ton; for the next three years at five dollars per ton; for the four years thereafter at four dollars per ton; and for the six years remaining at the rate of three dollars per ton, delivered upon the cars at the mines of the said party of the second part, and which shall not be less than ten per cent. added to the cost of same to the said party of the second part. This contract to be and remain in full force and effect for the full term of fifteen years from the date hereof.

“The said railroad company agrees to facilitate the operations of the said parties of the second part in prospecting and otherwise, by means of such information as it may possess, and by furnishing free passes on its road to the agents of the parties of the second part, not exceeding six in number. Said railroad company further agrees to put in switches and the necessary side tracks, at such points as may be mutually agreed upon, for the accommodation of the business of said parties of the second part; that the said parties of the second part agree to make all necessary exertions to increase the demand and consumption of coal by outside parties along the line of said railroad, and to open and operate mines at such points where coal may be discovered as may be desired by said railroad company; and to expend within the first five years from the date of this agreement, in the purchase and development of mines and mining lands, and improvements for the opening, successful and economical working of the same, not less than the sum of twenty thousand dollars; also to furnish for the use of the said railroad company good, merchantable coal, and to pay all expenses for improvements for loading coal into cars. Any improvement desired by said railroad company in regard to the coal to be used by it shall be at the cost of said railroad company.

“In consideration of their exertions to increase the demand for coal, and the large sum to be expended in improvements, it is further agreed that the parties of the second part shall have the right to transport over the said railroad and its branches, for the next fifteen years from the date of this agreement, coal for general consumption at the same freight that will be charged to others; but the said parties of the second part shall be entitled, in consideration of services to be ren-

dered as herein provided, to a drawback of twenty-five per cent. on all sums charged for the transportation of coal.

"The said railroad company agrees to furnish the parties of the second part such cars as they may require in the operation of their business, to transport them as promptly as possible. This agreement to remain in force for fifteen years.

"The coal lands owned by said party of the first part are hereby leased for the full term of fifteen years to the said parties of the second part or their assigns, for the purpose of working the same as may seem to them profitable; said parties of the second part to pay for the first nine years a royalty of twenty-five cents per ton for each ton of coal taken from their lands, excepting always coal taken from entries, air-courses or passage ways, for which coal no royalty shall be paid; payments for the same being due and payable monthly.

"The royalty for the last six years of this lease shall be free, provided the price of coal to the railway company is reduced to three dollars per ton. If three dollars and twenty-five cents or more per ton, then in that case the royalty shall be as during the first nine years.

"In witness whereof, we have hereunto set our hands and seals, this the day and year first above mentioned.

(Signed) "OLIVER AMES,

"President of the Union Pacific R. R. Co.

"C. O. GODFREY.

"THOMAS WARDELL."

This contract on the part of the railroad company was made by direction of the executive committee of the board of directors, of whom the president was one, and not by the board itself. It was never reported to the board for its consideration or action. But notwithstanding this defect, in August, following, the contractors, Wardell and Godfrey, entered upon its execution, and began work on several mines along the line of the road. Soon afterward Godfrey transferred his interest to Wardell, perceiving, as the bill alleges, that sums beyond those stipulated would be required, and being alarmed at the risks which he believed he had assumed.

In January following (1869) a corporation under the laws of Nebraska, called the Wyoming Coal and Mining Company, was formed to develop and work the mines, having a cap-

ital stock of \$500,000, divided into shares of \$100 each, a majority of which was taken by six of the directors of the railroad company, one of whom was its president; and to it Wardell assigned his contract without any consideration.

The corporation continued the execution of the contract, Wardell acting as its superintendent, secretary and general manager, and delivered coal as needed by the railroad company up to the 13th of March, 1874, when the officers and agents of that company, by order of its directors, took forcible possession of the mines, and of the books, papers, tools and other personal property of the coal company, which they have held and used ever since. Hence the present suit, which Wardell brings in his own name, alleging as a reason that a majority, if not all of the directors and stockholders of the coal company except himself, are also directors and stockholders of the railroad company, and that therefore he can obtain no relief by a suit in the name of the coal company. He prays that an account may be taken for the amount due for the coal delivered to the railroad company; for drawback on freight from the date of the contract to the forcible seizure alleged; for coal extracted from the mines since their seizure; for the property of the coal company taken, and for the damages arising from the seizure and the attempted abrogation of the contract; and that the rights and interests of the several parties may be ascertained and declared; and for general relief.

To this bill the railroad company filed an answer, setting up in substance three defenses.

1st. That the contract of July 16, 1868, was a fraud upon the company; that it was made on its part by the executive committee of its board of directors, a majority of whom were by previous agreement to be equally interested with the contractors in it, and for that reason its terms were made so favorable to the contractors and unfavorable to the company as to enable the former to make large gains at the expense of the latter, and that the organization of the Wyoming Coal and Mining Company was a mere device to enable those directors to participate in the profits; and that therefore the contract was of no validity and binding obligation upon the company.

WARDELL V. THE UNION PACIFIC R. R. Co. 149

2d. That, at the time of the seizure of the property, the railroad company was the owner of nine tenths of the stock of the coal company, and had become apprehensive that Wardell, its superintendent and manager, would not furnish the coal needed to run the trains; and


3d. That since then the coal company and the railroad company, through their board of directors, have had a settlement of their transactions, by which the contract of July 16, 1868, has been rescinded, and the sum of \$1,000,000 allowed to the coal company, and that the railroad company has set apart and tendered to the complainant \$100,000 for his share of the coal company, in that settlement.

The court below held that the contract of July 16, 1868, was a fraud upon the company, but that the complainant was, apart from it, entitled to some compensation for his time, skill and services while engaged in taking out the coal, with the return of the money actually invested, and compensation for its use, the amount to be credited with what he had actually received out of the business; and that at his election he could have an accounting upon that basis or take the \$100,000 tendered by the company. Of the alternatives thus offered the complainant elected to take the \$100,000 instead of having the accounting mentioned, but appealed to this court from the decree, contending that the contract itself was valid, and that he is entitled to an accounting upon that hypothesis.

The evidence in the case justifies the conclusion of the court below as to the nature of the contract of July 16, 1868. It was evidently drawn more for the benefit of the contractors than for the interest of the company. The extent, value and accessibility of the coal deposits along the line of the road of the company were, as stated above, well known at the time to its directors having the immediate control and management of its business. Wardell, the principal contractor, informed those with whom he chiefly dealt in negotiating the contract, that coal could be delivered to the company at a cost of two dollars per ton, yet the contract, which was to remain in force fifteen years, stipulated that the company should pay treble this amount per ton for the coal the first two years, two and a half times the amount for the next three years, twice the

amount for the following four years, and one half more for the balance of the time. And lest these rates might prove too little, the contract further provided that the sum paid should not be less than ten per cent. added to the cost of the coal to the contractors. These terms and the leasing of all the coal lands of the company for fifteen years to those parties upon a royalty of twenty-five cents a ton for the first nine years, and without any royalty afterward if the price of the coal should be reduced to three dollars, with the stipulation to provide side tracks to the mines, and also to furnish cars for transportation of coal for general consumption, and after charging them only what was charged to others, to allow them a drawback of twenty-five per cent. on the sums paid, gave to them a contract of the value of millions of dollars. These provisions would of themselves justly excite a suspicion that the directors of the railroad company, who authorized the contract on its behalf, had been greatly deceived and imposed upon, or that they were ignorant of the cost at which the coal could be taken from the mines and delivered to the company. But the evidence shows that those directors were neither deceived nor imposed upon, nor were they without information as to the probable cost of taking out and delivering the coal. And what is of more importance, it shows, as alleged, their previous agreement with the contractors for a joint interest in the contract, and in order that they might not appear as co-contractors, that a corporation should be formed in which they should become stockholders, and to which the contract should be assigned; and that this agreement was carried out by the subsequent formation of the Wyoming Mining and Coal Company, and their taking stock in it. This matter was so well understood that when the contractors commenced their work in developing the mines and taking out the coal, they kept their accounts in the name of the proposed company though no such company was organized until months afterward.

It hardly requires argument to show that the scheme, thus designed to enable the directors who authorized the contract to divide with the contractors large sums which should have been saved to the company, was utterly indefensible and illegal. Those directors, constituting the executive committee



of the board, were clothed with power to manage the affairs of the company for the benefit of its stockholders and creditors. Their characters as agents forbade the exercise of their powers for their own personal ends against the interest of the company. They were thereby precluded from deriving any advantage from contracts made by their authority as directors, except through the company for which they acted.

Their position was one of great trust, and to engage in any matter for their personal advantage inconsistent with it, was to violate their duty and to commit a fraud upon the company.

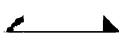
It is among the rudiments of the law that the same person can not act for himself and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. Thus a person can not be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and "constituted as humanity is, in the majority of cases duty would be overborne in the struggle." *Marsh v. Whitmore*, 21 Wall. 178, 183. The law, therefore, will always condemn the transactions of a party on his own behalf, when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is reasonably resisted. Directors of corporations and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They can not, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railroad company to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original

company, and will be condemned whenever properly brought before the courts for consideration: *Great Luxembourg Railway Co. v. Magnay*, 25 Beav. 586; *Benson v. Heathorn*, 1 Y. & Col. C. C. 326; *Flint & Pere Marquette Railway Co. v. Dewey*, 14 Mich. 477; *European & North American Railway Co. v. Poor*, 59 Me. 277; *Drury v. Cross*, 7 Wall. 299.

The scheme disclosed here has no feature which relieves it of its fraudulent character, and the contract of July 16, 1868, which was an essential part of it, must go down with it.

It was a fraudulent proceeding on the part of the directors and contractors who devised and carried it into execution, not only against the company but also against the government, which had largely contributed to its aid by the loan of bonds and by the grant of lands. By the very terms of the charter of the company five per cent. of its net earnings were to be paid to the government. Those earnings were necessarily reduced by every transaction which took from the company its legitimate profits. It is true that some of the directors, who approved of or did not dissent from the contract, early stated that they held their stock in the coal company for the benefit of the railroad company and transferred it or were ready to transfer it to the latter; but the majority expressed such a purpose only when the character and terms of the contract became known and they were desirous to screen themselves from censure for their conduct.

The complainant, therefore, can derive no benefit from the contract thus tainted, or sustain any claim against the railroad company for its repudiation. The coal company may, perhaps, be entitled to reasonable compensation for the labor actually expended in the development of the mines and delivery of coal to the railroad company, considered entirely apart from the contract, and also for its property forcibly taken possession of by the officers of the railroad company. But an accounting for compensation thus limited is not desired by him, and as the two companies have since settled the matter in dispute between them by the payment of \$1,000,000 to the coal company, of which \$100,000 has been set apart for complainant, and he has elected to take that sum if an accounting can not be had upon the assumed validity of the contract, the decree of the court below is affirmed.



1. The burden of charging as well as proving fraud is on the party alleging it: *Hale v. The West Va. Oil, etc., Co.*, 11 W. Va. 229.

2. Burden of proof to show value paid, etc., is on holder of fraudulent note: *Perkins v. Prout*, 2 M. R. 139.

3. Proof of the *res gestæ*, in cases of fraud: *Id.*

4. A statement that "the surface is rich in gold," is a statement of fact and not of opinion; and so are statements in regard to width of vein and assays of ore: *Smith v. Richards*, 13 Peters, 39.

5. Sale of oil by fraudulent sample: *Maute v. Gross*, 56 Pa. St. 250; *Post OIL*.

6. Evidence of subsequent results of working as proof of inadequate consideration at time of sale: *Henry v. Everts*, 5 M. R. 603; *Bean v. Valle*, 2 Mo. 127; *Post SPECIFIC PERFORMANCE*.

7. Agent concealing facts from his principal: *Norris v. Tayloe*, 1 M. R. 383.

8. A partner not participating in the fraud of his associate may be liable for the consequences; but fraud can not be imputed to him so as to impeach his discharge in bankruptcy: *Curtis v. Waring*, 92 Pa. St. 104.

9. Partner stipulating clandestinely for private advantage held to be a trustee for the other partners: *Fawcett v. Whitehouse*, 1 Russ. & M. 132; *Post PARTNERSHIP*.

10. Fraud in accounts of lessee whose tenancy is affected by the fact of his holding fiduciary relations, as agent, at the same time: *Beaumont v. Boulton*, 1 M. R. 253, 263, 278.

11. Purchaser concurring in fraudulent breach of trust: *Barksdale v. Finney*, 14 Grattan, 338; *Post TRUST*.

12. Joint fraud of vendor and organizers of purchasing company: *Vigers v. Pike*, 8 C. & F. 562; 2 Dru. & W. 1.

13. Joint buyer colluding with vendor to deceive purchaser as to soapstone quarry: *Page v. Parker*, 40 N. H. 47; 43 Id. 363; 6 M. R. 514.

14. Credit mobilier contracts: *Rice's Appeal*, *Ahl's Appeal*, 3 M. R. 638; *Thomas v. R. R. Co.*, 109 U. S. 522.

15. A transaction apparently fraudulent, as the promise of a corporation to pay the individual debts of its members, may be shown to be valid by proof that, in fact, these liabilities were corporate debts: *Head v. Horn*, 18 Cal. 211.

16. Company affected with notice of fraud by its organizers: *Hoffman Co. v. Cumberland Co.*, 16 Md. 456.

17. Liability of officers and associates for fraudulent organization of corporation: *Densmore Co. v. Densmore*, 3 M. R. 569; *Cumberland Co. v. Sherman*, 1 M. R. 322.

18. Company failing to procure all of the mineral lots mentioned in its prospectus: *Kelsey v. Northern Light Co.*, 45 N. Y. 505; *Post STOCK*.

19. Measure of damages in action for fraudulently inducing plaintiff to enter into oil speculation: *Crater v. Binninger*, 33 N. J. Law, 513; *Post MEASURE OF DAMAGES*.

20. Sale on false representations; measure of damages in excess of consideration paid: *Ahrens v. Adler*, 33 Cal. 608; *Post PLEADING*.

21. In pleading the defense of fraud arising out of sale of land, the land must be particularly described: *Wann v. McGoon*, 3 Ill. (2 Scam.) 74.

22. Liability arising from fraudulently preventing the happening of a condition upon which a right depends: *Stonecifer v. Yellow Jacket Co.*, 3 M. R. 4.

23. A contract void for fraud may be ratified without any new contract or new consideration: *Negley v. Lindsay*, 67 Pa. St. 217.

24. Notice of fraud received but not acted on, on account of relations of confidence: *Marston v. Simpson*, 54 Cal. 189; *Post* RESCISSION.

25. Plea of fraud by vendee, who yields to claims of third party without process or compulsion, and then avers want of title in his vendor: *First Nat. Bank v. How*, 1 Mont. 604; *Post* PLEADING.

26. Effect of delay by defrauded party: *Marston v. Simpson*, 54 Cal. 189; *Post* RESCISSION.

27. Bar of the Statute of Limitations to relief in equity on account of fraud: *Bradbury v. Davis*, 5 Colo. 265, 341; 3 M. R. 398, 403.

28. In a case depending upon alleged misrepresentation as to the nature and value of the thing purchased, the defendant can not adduce more conclusive evidence, or raise a more perpetual bar to the plaintiff's case than by showing that the plaintiff was from the beginning cognizant of all the matters complained of, or, after full information concerning them, continued to deal with the property, and even to exhaust it in the enjoyment, as by working mines: *Vigers v. Pike*, 8 Cl. & Fin. 650 (House of Lords).

29. Duties of vendee of stock who seeks to rescind on the ground of fraud; Laches: *Pence v. Langdon*, 99 U. S. 578; *Post* RESCISSION.

30. Purchaser concealing knowledge of the existence of a mine upon the land purchased: *Caples v. McBride*, 7 Oreg. 491; *Post* VENDOR AND PURCHASER; *Fox v. Mackreth*, 2 Br. Ch. Ca. 420.

31. A person who knows that there is a mine on the land of another, of which the latter is ignorant, may nevertheless buy it without committing a fraud: *Harris v. Tyson*, 24 Pa. St. 347; *Post* VENDOR AND PURCHASER.

32. The sale of mining stock without any misrepresentations, does not constitute a voidable contract, though the stock have little or no value: *Renton v. Maryott*, 21 N. J. Eq. 123; *Post* MORTGAGE; *Becker v. Hastings*, 2 M. R. 688.

33. False representations as to the price paid for lands, accompanied with expressions of opinion that the lands contain oil, will not support an action for deceit in the sale of real estate: *Hoibrook v. Connor*, 60 Me. 578.

34. Deed set aside when vendee had written to vendor that the mining land bought, was "only fit for sheep pasture": *Livingston v. Peru Iron Co.*, 9 Wend. 511, 2 Paige, Ch. 390.

35. Misrepresentations by vendors in sale of mining stock: *Crump v. United States M. Co.*, 3 M. R. 454.

36. Misrepresentation of vendor as to the boundary of land, as a ground for restraining the collection of the purchase money: *James v. Elliott*, 44 Ga. 237.

37. Where the buyer gets what he bargained for, there is no failure of consideration, though the subject-matter of the sale may turn out to be a thing of no value: *Penniman v. Winner*, 2 M. R. 448.

38. Rescission on the ground of fraud: *Grymes v. Sanders*, 93 U. S. 55; *Post* MISTAKE; *Jennings v. Broughton*, 5 De Gex M. & G. 125; *Post* PROSPECTUS.

39. Money paid to buyer to induce purchase of stock to escape liability: *In re Hafod Lead M. Co.*, 35 L. J. Ch. 304; S. C. 12 Jurist N. S. 242.

40. Action for damages for deceit is not necessarily an affirmation of the contract, so as to prevent suit to rescind: *Emma S. M. Co., limited, v. Emma S. M. Co.*, 7 Fed. R. 401.

41. Contract of sale will not be rescinded on the ground of fraud without the clearest proof of the fraud: *Attwood v. Small*, 6 Clark & F. 232.

42. Return of property, when necessary, in action for damages based on fraud: *Fitz v. Bynum*, 55 Cal. 459; *Post STOCK*.

43. Where a contract has been rescinded for fraud, and the consideration passed was not money, but a credit on a debt, the defrauded party is remitted to his rights on the contract on which payment was credited, and can not have relief in damages: *Degraw v. Elmore*, 50 N. Y. 1.

44. Wrongful acts in working coal beyond boundaries, not condoned by subsequent release of all damages for wrongful acts, if executed in ignorance of such breaking of boundaries: *Ecclesiastical Com. v. North Eastern Railway Co.*, L. R. 4 Ch. Div. 845; *Post RELEASE*.

45. Averments of fraud, mingled with the statement of a cause of action based on contract are not issuable, and will not justify the order of arrest allowed in actions based on fraud: *Graves v. Waite*, 59 N. Y. 156; *Payne v. Elliot*, 54 Cal. 339; *Post TROVER*.

46. The fraudulent obtaining of an injunction not a matter of accounting: *Hall v. Fisher*, 20 Barb. 441; *Post PLEADING*.

47. Bill for injunction by surety to stay execution because of fraud on principal: *Emmons v. McKesson*, 5 Jones' Eq. 92; *Post INJUNCTION*.

48. Contract for purchase of land from which vendees have been clandestinely removing coal, not enforced: *Phillips v. Homfray*, L. R. 6 Ch. App. 770; *Post VENDOR AND PURCHASER*.

49. Sale of shares induced by false prospectus: *In re Reese River Co.*, L. R. 4 H. L. 64; *Post RESCISSION*.

50. A trustee for the sale of estates, for payment of debts, who purchased them himself, by taking undue advantage of the confidence reposed in him by the plaintiff, and previous to the completion of the contract, sold them at a highly advanced price, decreed to be a trustee for the original vendor as to the sums produced by such second sale: *Fox v. Mackreth*, 2 Brown's Ch. Cas. 400.

51. Action for damages for deceit in the sale of oil lands: *Woodbury v. DeLap*, 1 Thomp. & C. 20; *Post PLEADING AND PRACTICE*.

52. Upon the cancellation of a contract on the ground of fraud, the court will decree the repayment of advances made by the party guilty of the fraud: *Perkins v. Sterrett*, Litt. Sel. Ca. (Ky.) 218; *Post RESCISSION*.

53. The opening of valuable diggings shortly after a purchase of lands, is no evidence of a fraudulent concealment of mineral value by the vendee: *Bean v. Valle*, 2 Mo. 132; *Post SPECIFIC PERFORMANCE*.

54. Unintended benefits resulting to a party from an attempt to defraud him, may be retained by him: *Pioneer Co. v. Baker*, 20 Fed. 4.

55. Excessive valuation of mines in exchanging them for stock: *Langdon v. Fogg*, 18 Fed. 5; *Lake Superior Co. v. Drexel*, 90 N. Y. 87.

56. Expression of opinion of value of unopened quarry, no case of fraud: *Gordon v. Butler*, 105 U. S. 553.

MATEER v. BROWN.

(1 California, 221. Supreme Court, 1850.)

Nonsuit—Shifting position in Appellate Court. The ruling that a compulsory *nonsuit* may be allowed, affirmed; but a defendant asking *nonsuit* on specific grounds below, can not shift his position on appeal. If the evidence does not justify a verdict, or if a verdict found would be set aside by the court, a *nonsuit* ought to be granted.

Declarations of agent beyond the *res gestæ*. The declarations of an agent or servant are admissible against the principal only when they form a part of the *res gestæ*; the admission of a barkeeper as to contents of package left by guest, made to third person, excluded under this rule.

Gold dust left with innkeeper. An innkeeper, like a common carrier, is an insurer of the goods of his guest, and is accountable in case of either theft or robbery—but he is so liable only when the goods are deposited with him by travelers in the character of guests of the inn.

Appeal from the District Court of the Fourth Judicial District. The action was brought to recover \$5,500 worth of gold dust, claimed to have been lost in the inn of the defendant, while the plaintiff was staying there as a guest. All the important facts of the case will be found in the opinion of the court.

CALHOUN BENHAM, for plaintiff.

Mr. PARBURT, for defendant.

By the Court, BENNETT, J.

It was decided at the last term, in the case of *Ringgold v. Haven* (1 Cal. 108), that the power of compulsory nonsuit exists. We think the rule convenient, reasonable, and well supported by authority, and we shall adhere to it. On the trial of this cause, after the plaintiff had closed his evidence, the defendant moved for a nonsuit, "on the ground that the plaintiff had not proved by competent testimony the loss of any property of definite value." This being the only position

¹ Affirmed on rehearing, 1 Cal. 231.

² *Alexander v. Cauldwell*, 5 M. R. 650.

taken in support of the motion, unless that be tenable the nonsuit was properly refused, notwithstanding there may have been other good and sufficient reasons, for which, if urged at the proper time, it might have been demanded. A party making his motion on one ground, thereby impliedly waives all others. He can not avail himself of a different position, on appeal, from that which he assumed in the court below. This doctrine is well established, and is necessary to be sustained, in order that the plaintiff may not be misled in the course of the trial, and in the settlement of his bill of exceptions in case the nonsuit should be ordered.

The general rule by which courts should be guided in determining whether a nonsuit, when applied for, should be ordered, is, that if the evidence given by the plaintiff would not authorize a jury to find a verdict for him, or if the court would set it aside, if so found, as contrary to evidence, in such case it is the duty of the court to nonsuit the plaintiff: 1 Wend. 386; 6 Id. 436; *Ringgold v. Faven & Livingston*, above cited.

Let us apply these rules to the case before us. We must, however, first remark, that the question of admissibility of the evidence objected to, is one with which, in determining the point now under consideration, we have nothing to do. Assuming then that the evidence was admissible for the purpose of affecting the defendant, was it of such weight that a jury might legally and properly infer from it that the plaintiff had "lost any property of a definite value?"

Dexter, one of the witnesses for the plaintiff, testified that Higgins, the barkeeper of the defendant, stated in a conversation between them, "that the plaintiff had made his pile," and that, on opening a closet and raising a bundle, he said "it was the plaintiff's, and that it was about six thousand dollars." If this be legal evidence for any purpose, then, certainly, a jury might infer from it the value of the contents of the bundle. The evidence to prove the loss is not quite so strong, but it seems, from the course of the trial, that this was an uncontested and admitted point, and that the jury would have been warranted in finding the affirmative from the circumstances proved. The nonsuit was therefore properly refused.

We can not review the propriety of the refusal to nonsuit on the ground that the plaintiff did not show himself to have

been a guest in the house, because the motion for nonsuit was put upon a different ground.

The next question is as to the admissibility of the evidence objected to. Higgins was the barkeeper of the defendant when the gold dust, as is claimed, was received into the inn, and during the subsequent time down to the loss. It was argued by the plaintiff's counsel that, as Higgins was the agent of the defendant, the latter was bound by his declarations touching the subject-matter in controversy. The following questions were put to the witness, Dexter: "State what you heard Higgins, the barkeeper, say with regard to any money or gold dust received from Mateer," and "state what Higgins said at the time about the robbery." These questions or directions, the court, after objection by the defendant, permitted to be answered. It is asserted that the testimony given in reply to these directions was admissible as a part of the *res gestæ*. At the same time it is conceded that the declarations of Higgins, thus proved, were not made at the time of the delivery of the gold dust by plaintiff and the receipt of it by the defendant. Thus, the question is presented, whether the declarations of an agent or servant made to a third person concerning a deposit of which he has charge for his principal, at any time during the continuance of such charge, are competent evidence against the principal.

Greenleaf (1 Law of Ev. 126) says, that "where the acts of the agent will bind the principal, there his representations, declarations and admissions, respecting the subject-matter, will also bind him, if made at the same time and constituting a part of the *res gestæ*. They are of the nature of original evidence, and not of hearsay; the representation or statement of the agent, in such cases, being the ultimate fact to be proved, and not an admission of some other fact. But it must be remembered that the admission of the agent can not always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency, in regard to a transaction then depending, *et dum fervet opus*. It is because it is a verbal act and part of the *res gestæ*, that it is admissible at all; and therefore it

is not necessary to call the agent himself to prove it; but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it." As to any other facts in the knowledge of the agent, he must be called to testify, like any other witness: *Id.* 134.

Were the declarations of Higgins a part of the *res gestæ*, according to the above rules? We think not. There was no act done by him, in his character of agent, at the time of making them, which would have been admissible evidence against the defendant, and which such declarations were calculated to qualify or explain. They were not made at the time he received the deposit; had they been then made, they would, perhaps, have been competent. They were made when Higgins took the bundle out of the closet to exhibit it to a stranger. This was not done by him in the discharge of his duties as agent, and the declarations accompanying that act were but hearsay. It is impossible to tell what weight this improper evidence had on the mind of the court, in forming its judgment. We can not clearly see that it had no effect, and consequently, a new trial must be granted.

As the cause is to be retried, it is proper that we should express our views in relation to the other points in the case. The defendant insists that he is not liable in consequence of certain rules adopted by him for the government of his house, and a copy of which he kept posted up in his bar-room. The eleventh of these rules was as follows: "The proprietor will not be accountable for any boxes, bundles, bags, trunks, chests, clothing, specie, gold dust, bullion, or any other articles or material whatever, unless delivered to his special care, and a receipt given for the same."

It is unnecessary to determine whether an innkeeper, any more than a common carrier, can limit his legal responsibility by notice, or, if he can, whether it is not essential that actual knowledge of the notice should be brought home to his guest; inasmuch as we think that the requirement of the notice in this case was, so far as the plaintiff had anything to do, complied with. The delivery of the bundle to the barkeeper and agent of the proprietor, was a delivery to the "especial care" of the proprietor, within the meaning of his regulation; and

the plaintiff ought not to suffer from the neglect of the bar-keeper to give a receipt.

The remaining questions relate to the general principle on which the liability of innkeepers is based. It is claimed by the defendant that his house was burglariously entered, the barkeeper overcome by force, and the property carried off by robbers; and that these circumstances exonerate him from liability. The question then is, whether robbery from without, or burglary, will excuse an innkeeper for the loss of the goods of his guests; and the answer to it does not appear to be settled by the authorities.

Chancellor Kent (2 Comm. 591) says that innkeepers are responsible to as strict and severe an extent as common carriers, while in another place (Id. 593) he limits their responsibility to losses occasioned otherwise than by inevitable casualty, or by superior force, as robbery. Judge Story, in his work on Bailments (Sec. 472) says that innkeepers are not responsible to the same extent as common carriers; that the loss of the goods of a guest, while at an inn, will be presumptive evidence of negligence on the part of the innkeeper or his domestics; but that he may, if he can, repel this presumption by showing that there has been no negligence whatever, or that the loss is attributable to the personal negligence of the guest himself; or that it has been occasioned by inevitable casualty or by superior force. Thus, he continues, although a common carrier is liable for all losses occasioned by an armed mob (not being public enemies), an innkeeper is not (*as it should seem*) liable for such loss. Neither is he liable (*it should seem*) for a loss by robbery and burglary by persons from without the inn. It will be observed that the commentator advances this latter doctrine with some degree of hesitation and doubt, and in language which implies that he did not himself consider it as settled. Sir William Jones, in his essay on Bailments (p. 94), says it has long been holden that an innkeeper is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through his agents, be damaged in his inn, or stolen out of it by any person whatever; and yet he says (p. 96) that it is competent for the innholder to repel the presumption of his knavery or default, by proving that he took *ordinary* care,

or that the force which occasioned the loss or damage was truly irresistible.

It thus appears that while Judge Story leaves the point under consideration at loose ends, the two other distinguished commentators above cited are still more uncertain, as neither of them apparently agrees with himself; and from their opposing rules it is difficult to determine to which side of the question they intend to adhere. The contradiction found in the writings of commentators, as well as the diversity which exists in the decisions on which their various statements are rested, seem to have sprung out of a departure from the principles on which the extraordinary liability of innkeepers and common carriers is based, and from what appears to be an erroneous construction put upon the doctrine laid down by Lord Coke in *Calye's Case*, 8 Rep. 32. Thus Judge Story and Chancellor Kent, in support of the position that an innkeeper is not liable for the loss of the goods of his guests occasioned by robbery and burglary, rely in part, at least, on the authority of Calye's case, while Sir William Jones cites no authority whatever in support of the strange proposition that the innholder may escape from responsibility by proving that he took *ordinary* care of the goods of his guest. Following in the track of the same departure from principle, in which commentators have wandered, are several decisions of recent date. Such are *Burgess v. Clements*, 4 M. & Selw. 306, and *Darson v. Chamney*, 5 Adol'ph. & Ell. N. S. 164. The tenor of Calye's case, however, sanctions no such doctrine, although the particular passage in it, by which the lax rule of the responsibility of innkeepers is sought to be sustained, appears, at first sight, to be somewhat uncertain. It is there laid down that the innholder shall not be charged, unless there be a *default* in him or his servants, in the *well and safe keeping and custody* of the guest's goods and chattels within his common inn; for the innkeeper is bound in law to *keep them safe* without any stealing or purloining; and it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber door open; but he *ought to keep the goods and chattels of his guests there in safety*. But if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or

carries away his goods, the innkeeper shall not be charged for there the fault is in the guest to have such companion or servant. So, also, if the innkeeper require his guest to put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not, and the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest. Lord Coke is here commenting on the writ in the *Register Brevium*, which recites that, by the custom of the realm, innkeepers are obliged to keep the goods and chattels of their guests, which are within their inns, without subtraction or loss, day and night, so that no damage, *in any manner*, shall thereby come to their guests, from the *default (pro defectu)* of the innkeeper or his servants.

The reasoning of Coke is simply this: The innkeeper is bound by law to keep the goods of his guest *safely*; if he does not perform this obligation, the law, which imposes on him the responsibility, declares him to be in default; but if the loss of the goods be ascribable to the fault of the guest, then the innkeeper is excused, for the words of the writ are *from the default of the innkeeper or his servants*. He makes no distinction between losses occasioned by superior force, by robbery by persons within the house and persons from without, by secret theft, or by an armed mob. On the other hand, he apparently discountenances the distinction; for he says, "these words, *absque subtractione seu ommissione*, extend to all movable goods, although of them felony can not be committed; for the words are not *absque felonica captione*, etc., but *absque subtractione*, etc. It strikes us forcibly that the uncertainty and confusion which have been thrown over this branch of the law have arisen from confounding the word *defectu* in the writ, and the word default used by Lord Coke as its translation, with the term negligence; an error into which Judge Story himself seems to have fallen: Story on Bailments, Sec. 470. The question of negligence does not, according to the language of the writ in the *Register Brevium* or the Commentary of Coke, constitute a subject for discussion in ascertaining the responsibility of innkeepers, any more than it does in ascertaining that of common carriers. The law requires of the former to keep the goods safely, as it

does of the latter to carry them safely, and in case either fails, from any cause, to comply with this legal obligation, the law pronounces him in default, unless the loss be occasioned through the fault of the owner of the goods, or by the act of God, or by the public enemies. It seems, therefore, that the dictum of Mr. Justice Bayley in *Richmond v. Smith*, 8 Barn. and Cress. 9, is a concise and accurate summary of the doctrine of Calye's case. "It appears to me," he says, "that the innkeeper's liability very closely resembles that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies, although he may be exonerated where the guest chooses to have his goods under his own care." And although that dictum has been overturned in England by the subsequent decision in *Dawson v. Chamney*, 5 A. & E. N. S. 164, we think the dictum right, and the decision wrong. Stephen, in his Commentaries (2 Comm. 133) says that an innkeeper is responsible for the goods and chattels brought by any traveler to his inn, in the capacity of guest there, in every case where they are lost, damaged, stolen or taken by robbery, except where they are stolen by the traveler's own servant or companion, or from his own person, or from a room which he occupied as a mere guest, or entirely through his own gross negligence; and Mr. Chitty, in a note to Blackstone's Commentaries (1 Comm. 430, note 22), declares it to be long established law, that the innkeeper is bound to restitution, if the guest is robbed in his house by any person whatever; unless it should appear that he was robbed under circumstances like those which, as above seen, constitute admitted exceptions. In the recent case of *Mason v. Thompson*, 9 Pick. 280, 284, it had been laid down in Massachusetts that innkeepers as well as common carriers are regarded as *insurers* of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God, or the common enemy, or the neglect or fault of the owner of the property. And in *Grinnell v. Cook*, 3 Hill, 488, Mr. Justice Bronson states the rule in the following words: "The innkeeper is bound to receive and entertain travelers, and is answerable for the goods of the guest, although they may be stolen or otherwise lost *without any fault on his part*. Like

a common carrier, he is an *insurer* of the property, and nothing but the act of God or public enemies will excuse a loss." It thus appears that some courts as well as commentators are, at length, returning to the sound and healthy principle of the common law, which places the liability of innkeepers and carriers on the same ground. And why should there be any distinction? "Rigorous as the law in relation to innkeepers may seem," says Sir William Jones (Bailments, 95, 96), "and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield; for travelers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunity of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them." Now, these are the very reasons assigned by the law for the extraordinary responsibility imposed on common carriers; and the reason for the rule being the same in both cases, there is, in principle, no propriety in making a distinction. We think that an innkeeper is bound to keep the property of his guest safe from burglars and robbers without, as well as from thieves within, his house.

One point further remains to be considered. It appears from the testimony that the bundle, which is claimed to have contained the gold dust, was not taken to the defendant's inn until several days after the plaintiff became his guest. As, in order to entitle the plaintiff to recover, it is necessary for him to establish his character of guest in the inn of the defendant, so also it is equally necessary that it should appear that his goods were taken there in the capacity of guest: 2 Stephen's Comm. 133. The liability of the innkeeper results from the relation of guest in which the traveler stands to him, and extends only to those things which properly pertain to him in that relation: Calve's case above cited. It does not necessarily follow that the strict responsibility can be imposed on an innkeeper for all property which his guest may choose to bring into the inn, after he has been received *infra hospitium*;

or that the latter may make the former a compulsory depositary of any amount of goods or treasure, which, during his sojourn in the inn, he may desire to keep secure. The innkeeper is bound by law to receive the traveler and his goods, and, for a refusal, in case he has sufficient accommodations for him, he is liable not only to an action on the case for the private damage, but to indictment for the public wrong: 3 Blackstone's Comm. 164; 4 Stephen's Comm. 296, note *n*. Inns are instituted for passengers and wayfaring men; and the keepers thereof can be held to the strict legal liability only for such goods as are brought into their inns by travelers in the character of guests. It would be too great a responsibility if that liability could be extended so as to cover any conceivable amount of money or gold dust, which the traveler, after he has become a guest, might be disposed to thrust into the custody of his host, and thus compel him to become the insurer of his safety. We think, in this case, it is a question which the jury should decide: whether the bundle was taken to the inn of the defendant by the plaintiff in his character of guest, in which event the defendant's liability would cover all losses, or whether, after the plaintiff became a guest with the defendant, it was deposited there in the nature of an ordinary bailment, in which case the defendant would be bound to exercise no more, at the farthest, than ordinary diligence, and would be answerable, certainly, for nothing more than ordinary neglect.

New trial granted, costs to abide the event.

WALLING V. MILLER & Co.

(15 California, 38. Supreme Court, 1860.)

Garnishment of ballee of amalgam for coining. Defendants, expressmen, received a lot of amalgam to take to the mint and have converted into coin. It belonged to five owners, one of whom, Carpenter, assigned his interest to the plaintiff. Defendants, after the assignment, but before they had notice thereof, were garnished on behalf of a creditor of Carpenter, on which garnishment they paid his share of the money. Before payment they had notice of the assignment: *Held*,

that the assignment was valid; that Carpenter had no exclusive interest in any part of the coin until it was converted into coin and divided; that his right was a chose in action, which he could by an order assign, and that the Statute of Frauds, requiring delivery of possession, had no application to such a case.

Assignment before garnishment. An attaching creditor has no precedence over the assignee of the fund where the assignment is prior to the service of the garnishment.

Appeal from Thirteenth District.

Judgment for defendant below. The opinion states the facts.

HEYDENFELDT, for appellant. 1. The money attached was a chose in action, and belonged to plaintiff, having been assigned to him before the attachment was levied. A chose in action does not require immediate delivery on sale, as personal property. 2. The proceeding by attachment is a garnishment, which is in effect a suit against the debtor of the creditor's debtor, and governed by the rules applicable to other suits: *Travis v. Tait*, 8 Ala. 576; *Thomas v. Hopper*, 5 Id. 444; 2 Cal. 33; 3 Id. 253, 363; 4 Id. 243, 409; 5 Id. 118. 3. After assignment of a debt, it can not be garnisheed, even though there was no notice of the assignment before the garnishment: *Dore v. Dawson*, 6 Ala. 712; *Baker v. Moody*, 1 Id. 315; *Fortescue v. State Bank*, 4 Id. 385; 2 Id. 177.

BALDWIN, J., delivered the opinion of the court, FIELD, C. J., concurring.

Defendants were expressmen, with an office at Coulterville, in Mariposa county. One George W. Coulter was their agent. Walling, the plaintiff, delivered to defendants a quantity of amalgam, to be forwarded to San Francisco, to be there coined, and returned. This amalgam belonged to five persons, who were partners in quartz mining, the plaintiff and one Carpenter among them. On the first of July, 1858, while this property was in the hands of these carriers, Carpenter sold to plaintiff, for a valuable consideration, his interest in this amalgam, and gave his receipt to the plaintiff, evidencing the contract. The defendants the next day returned to Coulterville with the coin made of the dust in San Francisco, and deposited it with Coulter, their agent; and on

the same evening the coin was attached by a constable for debts of Carpenter. The defendants had no notice of this transfer to the plaintiff until after the attachment; but on the next day the plaintiff gave notice to defendants, and demanded the share of Carpenter in this coin, still in their or their agent's possession. Defendants refused to pay it over, but afterward paid it to the constable. Upon these facts, the judge found that the plaintiff could not recover, basing his judgment upon the provisions of the Statute of Frauds, which require possession of personal property to accompany and follow a sale, in order to its validity as to third persons. In this ruling, the court erred. The statute has no application to such a case as this. The property was joint; Carpenter had no defined and exclusive interest in any part, but merely a common interest in all with his partners. The property was in constructive possession of all, the possession of the bailees being the possession of their principals. It was not money, but to be converted into money. After it was so converted, it required division before any particular portions of the coin became the property of any one of the partners. The right of Carpenter was a chose in action, which he could assign in any legal mode. He could assign it by order in favor of the purchaser or assignee. He did so assign. At the time of the assignment there was no possibility of a manual delivery of the specific coin to which he was entitled. The order was a good assignment of his right, after which Carpenter had no title to the money, and his creditors, representing only his right, could not seize it for his debts. The case is not different from the case of an order on a banker for a general balance, in which case the order operates a complete assignment, and protects, if the transaction be fair, and for a valuable consideration, the money against the process of creditors. The service of the attachment upon the defendants was only a garnishment; and it is well settled that this does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of the garnishment.

Upon the facts, we think the plaintiff entitled to recover—the payment to the officer, after notice, being no protection. See *Hardy v. Hunt*, 11 Cal. 343, for the doctrine in such cases.

Judgment reversed and cause remanded.

HELLMAN V. HOLLADAY.

(1 Woolworth, 365. U. S. Circuit Court, District of Nebraska, 1868.)

¹ Surreptitious carriage of gold dust. If a passenger surreptitiously introduce into a coach an article of great value (gold dust) with the view of getting it carried for nothing when the carrier is accustomed to charge for such service, he is guilty of a gross fraud, and in case of loss can not recover.

Contract, after fraud known. But if, notwithstanding the passenger's intention to defraud him, the carrier, after learning of the fact, charges, and the passenger pays for carrying the article as extra baggage all the charges usual therefor, then the carrier is liable for the value of the article, if lost.

Proof of freight paid. It is for the jury to determine whether the carrier received the compensation knowing the baggage to contain gold; and if he did he is liable for it without regard to the rates charged.

Hellman & Cahn, partners, sued Holladay for \$10,114, for gold dust of that value, lost while being transported on the defendant's stages. The circumstances, as detailed in the petition were, briefly stated, these:

The defendant was the proprietor of a line of stages and of a treasure express, running from Great Salt Lake in Utah *via* Denver in Colorado to Omaha in Nebraska. Cahn took passage at Salt Lake for Omaha, and paid the usual fare, being \$300; and having a quantity of gold dust, the defendant undertook to carry that for \$5 per \$1,000 extra, which said Cahn then and there paid. Near Fort Bridger this gold dust was lost off the coach by reason of the unskillful driving of the coach by the defendant's driver who became intoxicated, and also, because the gold dust was placed in the boot of the coach, and not there properly secured.

To meet this case the defendant in his answer alleged that his "treasure express" was conducted by means of messengers who accompanied all articles to be thereby carried, and used iron safes and other precautions for carrying them safely, and the charges on articles so carried were at the rate of \$50 per \$1,000; that all passengers on the coaches were advertised of that fact, and that the defendant would not be re-

¹ *First Nat. Bank v. Marietta R. R.*, 20 Oh. St. 259; 5 Am. Rep. 655; *Mich. Cent. R. R. v. Carrow*, 73 Ill. 343; 24 Am. Rep. 248.

sponsible for, and forbade the carrying of gold dust by passengers, because the line ran through a country little frequented and where exposures to robberies and Indian attacks were great; that said Cahn introduced the gold dust into the coach surreptitiously and paid for it as extra baggage without informing the defendant's agents, and without their knowing that it was valuable; that Cahn placed his baggage in the boot of the coach, and gave to the driver the liquor by which he was intoxicated.

The suit was originally commenced in one of the district courts of the late Territory of Nebraska, and on the organization of the Federal courts in the State was transferred to this court on account of the citizenship of the parties. At this term it came on to be tried before the court and a jury.

It appeared from the evidence that there were several passengers on board the coach, traveling in company with the said Cahn; that they had with them a large quantity of gold dust, for which, neither as treasure nor extra baggage, did they pay anything at Salt Lake City. They had proceeded in the stage some forty miles, to a station known as Millersville, when the general superintendent and the local agent of the stage line came to the coach, and told them that telegrams had been received from Salt Lake that they had extra baggage; that the baggage must be weighed, and they must pay for whatever exceeded 100 pounds to the passenger, at prescribed rates, as extra baggage. A good deal of baggage was taken out, weighed, paid for and replaced.

The plaintiffs introduced evidence tending to prove that at this time Cahn told the general superintendent that he had the gold dust here sued for, and before his eyes placed it in a carpet bag, and the driver placed it in the boot; that he paid for it as extra baggage, with the full knowledge on the part of the defendant's agents of its nature.

The defendant showed by the evidence the manner in which he carried treasure, the rates charged by him therefor, and the notice to passengers limiting his liability, as charged in his answer. He also introduced evidence tending strongly to show that the gold dust was surreptitiously and fraudulently introduced into the coach by Cahn at Salt Lake; that his agents, neither there nor at Millersville, knew his baggage

contained articles of such value; and that he or his companions, with his assent and even encouragement, gave to the driver the liquor which he drank; and that he placed the carpet sack in the boot of the coach, or caused the driver to place it there, without knowing its contents.

The defendant requested the court to instruct the jury (among other things) as follows:

“If the jury believe from the evidence that Cahn assisted or encouraged his fellow passengers in getting the driver drunk; that he caused him to put the carpet bag containing the gold dust in the boot of the coach, the driver not knowing that it contained gold dust; that he surreptitiously introduced the gold dust into the coach at Salt Lake to avoid paying the rates chargeable in the express, and at Millersville paid for it as extra baggage only, and at the rates chargeable therefor, then you will find for the defendant.”

Messrs. REDICK & BRIGGS, for the plaintiffs.

Mr. POPPLETON and Mr. WOOLWORTH, for the defendant.

Mr. Justice MILLER.

I can not give this request as drawn. There is evidence here which it ignores. It was evidently framed with the purpose of shutting out from the consideration of the case certain evidence introduced by the plaintiff. The credibility of that testimony is not for us to pass on. It is for the jury. The jury must be instructed upon the law as it stands on the whole of the evidence. The testimony which I refer to as not taken account of in the request is that of the plaintiff, tending to show that when the payment was made for extra baggage, the defendant's agents knew that the carpet sack contained gold dust, and knowing that fact, charged for it only the rates usual for extra baggage.

I agree with the defendant's counsel that if Cahn introduced the gold into the coach secretly at Salt Lake, and attempted to get it carried for nothing, he was guilty of a gross fraud. If that were the whole of the case he could not recover here. In this view of the case it may, upon the authorities, be

doubtful even whether it is incumbent to bring home to Cahn notice that the carrier would not be liable for gold thus carried. In that view the case would, without any evidence, show an intentional concealment in order to escape payment for a service rendered to the passenger by the carrier. That would be a fraud, and the law would not aid the party practicing it. It would be a fraud by which the passenger, without payment, would secure an advantage, and if he could recover for a loss, it would be a great advantage. It would be forcing a contract on a carrier which he did not make.

The case of the *Orange County Bank v. Brown*, 9 Wend. 116, is precisely in point. A traveler on a steamboat on the Hudson river took \$11,250, to be carried for the plaintiff. He placed it in his trunk, which, with its contents, was lost on board. The plaintiff sought to recover the money as lost baggage. Mr. Justice NELSON, in an able opinion, held that this amount of money was too large to come under the head of "baggage," and that an attempt to have it carried free of reward under the cover of baggage was an imposition upon the carrier, and that he was deprived of his just compensation, and subjected to unknown risks by such devices.

But that case and the many others in which it has been followed is distinguishable from this in the particulars which I have mentioned. Here there is evidence tending to show that the carrier knew that the baggage contained the gold.

If he did, he was not deceived. Cahn may have intended to deceive and defraud him. If he did, he failed to do so.

If the carrier knew that the carpet sack contained the gold, and took not the usual rates chargeable for gold, but only such as were chargeable for ordinary extra baggage, then he was not defrauded. The *Orange County Bank* case proceeds throughout on a state of facts which, as the plaintiffs claim, differs from that shown here. Whether they are right, we must leave it to the jury to say. This instruction does not do so, and we can not give it as requested.

The other matters referred to in the request are properly submitted to the jury.

I will give the request modified according to the views I have expressed.

The jury returned a verdict for half of the sum claimed, thus dividing the loss between the parties.

CREIGHTON ET AL. V. VANDERLIP ET AL.

(1 Montana, 400. Supreme Court, 1871.)

Contract subsequent to note. An agreement reducing the rate of interest on a note payable in gold dust, extending time of payment and setting apart property to secure such payment. *Held*, no merger of the original contract to pay the gold dust.

¹ **Merger.** A note is not merged in an agreement which does not by its terms or by legal intent defeat a right of action thereon.

² **Situation of contracting parties.** The situation of the parties at the time of entering into contract relations may be considered by the court in interpreting their acts.

Appeal from the First District, Madison County.

This case was tried by a jury, in November, 1870, and a verdict rendered for defendants. The court, WARREN, J., overruled the motion for a new trial, and Creighton appealed. The facts appear in the opinion.

H. N. BLAKE, for appellants.

W. Y. LOVELL, W. F. SANDERS and S. WORD, for respondents.

WADE, C. J.

This case comes into this court upon appeal from an order in the court below, overruling a motion for a new trial.

The complaint is founded upon a written instrument, of which the following is a copy:

“VIRGINIA CITY, M. T., Nov. 5, 1867.

“Six months after date we, or either of us, promise to pay to Norval Harrison and Columbus Hampton, or order, two hundred and twenty-two ounces four and one half penny-weights of clean gulch gold dust, or its value, with interest at the rate of five per cent. per month until paid.

“F. D. VANDERLIP,

“W. H. THOMAS,

“JOHN McROBERTS.”

¹ *Speed v. Hann*, 15 Am. Dec. 81, note.

² *Richards v. Schlegelmich*, 3 M. R. 78.

The complaint avers, that for a valuable consideration, on the 16th day of March, 1868, this note or contract was transferred by Harrison & Hampton to plaintiffs, and that plaintiffs are now the owners thereof, and that on the 18th day of July, 1868, the plaintiffs entered into an agreement with said Thomas and McRoberts, whereby the rate of interest to be paid on said instrument was to be computed at the rate of five per cent. per month from the 16th day of March, 1868, to the 18th day of July, 1868, and at the rate of three per cent. per month from the 18th day of July, 1868, until the same should be paid. That no part of the principal or interest has been paid, and that the same is now due to plaintiffs.

The defendant, Vanderlip, does not answer. The separate answer of defendants, McRoberts and Thomas, admits the execution and delivery of the note or contract described in complaint, the assignment thereof to plaintiffs on the 16th day of March, 1868, and the agreement as to the rates of interest as specified in said complaint. But said defendants, defending against the cause of action set forth in the complaint, aver, that on the 18th day of July, 1868, at Virginia City, Montana Territory, said plaintiffs, under the firm name and style of P. A. Largey (that being one of the firm names of said company), entered into an agreement with said defendants, Thomas and McRoberts, for a valuable consideration, whereby it was promised and agreed, in consideration of the covenants and promises in said contract contained to be done and performed by said defendants, the said plaintiffs did then and there and thereby release these defendants from any and all liability on the note or contract in the complaint set forth and described.

The agreement whereby these defendants claim to be released and discharged from the obligations of the note or contract upon which this suit is instituted, and from all liability thereon, is in the words and figures following, to wit:

“ AGREEMENT.”

“This agreement, made and entered into on this 18th day of July, A. D. 1868, by and between Patrick A. Largey of the first part, and William H. Thomas and John McRoberts of the second part, witnesseth:

"WHEREAS, the said Thomas and McRoberts did, on the 5th day of November, A. D. 1867, with one Frederick D. Vanderlip, make, execute and deliver to Columbus Hampton and Norval Harrison their certain promissory note, whereby they promised to pay and did obligate themselves to deliver to said Hampton and Harrison, for a valuable consideration, the amount of 222 ounces $4\frac{1}{2}$ pennyweights of clean gold dust, or the sum of \$4,000 in gold, the value of said gold dust, with interest from date at the rate of five per cent. per month until paid, and payable in six months from date of said note, which said note was secured by said Vanderlip by a certain mortgage duly executed and recorded, a reference for a full and perfect description of the same is hereby made to the copy of the same hereto attached and made part of this agreement; and,

"WHEREAS, the said Columbus Hampton and Norval Harrison did, for a valuable consideration, sell, assign, transfer and set over said note and mortgage, for a valuable consideration, on the 16th day of March, A. D. 1868, to E. Creighton & Co.; and,

"WHEREAS, the said Vanderlip, Thomas and McRoberts have failed to pay said note; and,

"WHEREAS, the said P. A. Largey has commenced suit on the same, in the District Court of the First Judicial District, in and for the County of Madison and Territory of Montana, by attachment; and,

"WHEREAS, the said writ of attachment has been levied upon certain property of said Thomas and McRoberts;

"Now, therefore, in consideration of the sum of \$1 each to the other paid, by the parties to this agreement, and the further consideration of the settlement of said suit, and all matters in dispute in difference by and between the said Largey, Thomas and McRoberts, by reason of said note being unpaid, it is agreed:

"1. That said Largey, his heirs or assigns, shall dismiss his said action in the District Court now pending, and release all of the said Thomas and McRoberts.

"2. That the said Largey, his heirs or assigns, agree with the said Thomas and McRoberts, that the only interest to be computed at five per cent. per month, from the 16th day of March,

A. D. 1868, until the 18th day of July, 1868; and from and after that day the interest to be computed; and it is expressly agreed that though the said note calls for five per cent. interest per month, the same shall only bear interest and be computed as against the said Thomas and McRoberts, at the rate of three per cent. per month until paid; and that the said Largey agrees and binds himself, his heirs and assigns, to forbear suit, to prosecute or in any manner to enforce the collection of said note or interest on the same, as against or from the said Thomas and McRoberts, for the space of one year from the said date of July 18, 1868.

"3. It is further agreed, that in order to enable the said Thomas and McRoberts, their heirs and assigns, to pay said note and interest out of the property named in said mortgage, to wit: the ditch, right of water and mining ground therein named, that the said Largey agrees and binds himself to at once deliver the quiet and peaceable possession of all the property named in said mortgage to the said Thomas and McRoberts upon the following terms and conditions, to wit: that is to say, that said Thomas and McRoberts shall take charge of all of said property, use and work the same to the best advantage, by the sale of water or the working of said mining ground, as in the judgment of the parties hereto may seem best for the interest of all the parties hereto; and after deducting all necessary expenses and charges, shall pay all moneys and gold dust that may come into the hands of said Thomas and McRoberts from said property, from any source therefrom unto the said P. A. Largey, his heirs or assigns; which money or gold dust so paid and received by said Largey shall be appropriated and applied by him or his assigns, in the manner following, to wit:

"First, to the payment of a certain promissory note or to any sum that may be now due thereon, or the interest that may be due or to become due, which said note is also named and set out in said mortgage, and now owned by said P. A. Largey, calling for 222 ounces, $4\frac{1}{2}$ dwts. of clean gold dust, or equal to \$4,000 in gold, with interest from date until paid at five per cent. per month, and dated November 5, 1867, and signed by F. D. Vanderlip and one James McEvily; and after the payment of said note and interest, as aforesaid, then the

said P. A. Largey or his assigns shall apply all money or gold dust, as paid by said Thomas and McRoberts from said property named in said mortgage, after deducting actual expenses of said Thomas and McRoberts as aforesaid, with the interest to be computed at three per cent. per month, as named in said note, from said 18th day of July, 1868, until paid; and that when said several notes with the interest thereon shall have been paid said Largey or his assigns, as aforesaid, by said Thomas and McRoberts, then and in that case it is agreed, and the right of possession and occupancy to all of the property named in said mortgage is hereby given and continued in and to said Thomas and McRoberts or their assigns, for such length of time as may be necessary, by reasonable use and work of said ditch and ground as aforesaid, until the said Thomas and McRoberts shall have reimbursed and paid back to themselves all the money or gold dust, with interest, at said rate, that they may have paid upon said note, as signed by said Vanderlip, McRoberts and Thomas, to said P. A. Largey; and when so reimbursed and paid back in full, then they shall, without process of law, return and deliver the property so held by them to the said Largey or his assigns.

"4. It is further agreed and understood by and between the said parties hereto, that in the event that said ground and the rent or sale of water from said ditch, or the diversion of the water from such ditch, if by any or from any of said causes the said Thomas and McRoberts are prevented from paying said notes last named and the interest thereon, then and in that case, after reasonable time and fair effort by said Thomas and McRoberts, then and in that case the said P. A. Largey binds himself, his heirs and assigns, to rebate and not require or demand any interest whatever of the said Thomas and McRoberts, but that all payments that may have been made by them shall be deemed, and are hereby declared to be, payments of the debt and principal of said note.

"5. It is further agreed and understood that to the enjoyment and fulfillment of the promises, agreements and undertakings, as herein expressed, that said P. A. Largey or his assigns agree and bind themselves that they will place the said Thomas and McRoberts in the quiet possession of all the

property herein named, and that he will maintain and keep good said possession without and free' of expense to said Thomas and McRoberts.

"6. It is further agreed, that to secure the payment of said last mentioned note and the faithful execution of this agreement, that the said Thomas and McRoberts shall cause to be made and executed to the said Largey or his assigns a mortgage by G. W. Allen of an undivided one fourth interest in all the property now owned by the Highland and Pine Grove Fluming Company, of Madison county, M. T., and of three hundred feet square of mining ground on East Bummer Dan Hill, in Fairweather district, county and territory aforesaid.

"7. It is further agreed and understood by and between the parties hereto, that for the faithful and perfect execution and performance of each and every agreement and undertaking as herein expressed, we do bind ourselves, each in the penal sum to the other, of ten thousand dollars, to be well and truly made.

"Witness whereof we have each set our hands and seals, this 18th day of July, A. D. 1868.

"P. A. LARGEY, [L. S.]

"W. H. THOMAS, [L. S.]

"JOHN McROBERTS. [L. S.]

"Signed in our presence.

"WM. Y. LOVELL,

"G. W. ALLEN.

"Done in duplicate."

To the introduction of this agreement in evidence by the defendants, the plaintiffs objected, upon the ground that it is no defense to the contract for gold dust; that it does not support the averments of the answer, and that, if plaintiffs are liable thereon, their proper remedy is a suit upon the agreement. These objections to the agreement were overruled, and the agreement received in evidence. This action of the court is assigned for error, and the main question presented by this record is as to the admissibility of the foregoing agreement in evidence, under the pleadings in this case.

The defendants aver, in their answer, that the agreement of July 18, 1868, released them from all liability upon the contract for gold dust, and that they are wholly discharged from

the obligations of the same. It is claimed by defendants that this agreement is a merger of the gold dust contract; that it was designed to, and that it does, take the place of said contract, and that, by reason of this agreement, a right of action upon the contract or note, in complaint described, has ceased.

It thus becomes necessary to ascertain, by careful analysis and interpretation, the true intent and meaning of the agreement of July 18, 1868.

At the time this agreement was made, the contract for gold dust (or, note, as I will hereafter call it for convenience) had become due, and a suit in attachment had been commenced against defendants, including defendant Vanderlip, and this situation of the parties we have the right to consider, to enable us to properly interpret their acts. The plaintiffs were demanding their pay upon the note then due and unpaid; the defendants could not meet this obligation, and this agreement was the result of this situation. Was it the intention of the parties thereto, and did they in terms merge the note in the agreement, and thereby abandon and lose their rights and interests in the note? The answer to this question will decide the case.

The stipulations of the agreement:

(1.) Caused the suit in attachment to be dismissed and settled.

(2.) It changed the rate of interest on the note from five per cent. to three per cent. per month.

(3.) It extended the payment of the note for one year, from July 18, 1868.

(4.) It stipulated to deliver ditch and mining property therein described to defendants Thomas and McRoberts, and from the proceeds thereof to pay, first, a note held and owned by plaintiffs against Vanderlip and one James McEvily, for two hundred and twenty-two ounces and four and one half pennyweights of gold dust; and, second, to pay the note in the complaint described; and, third, to remain in possession of said property, and to work the same until they should fully reimburse themselves, and pay back to themselves all the moneys or gold dust that they should so pay on said notes.

(5.) If, from any cause, defendants are hindered or prevented, by rent or sale of ditch and mining property, from paying notes, then the plaintiffs bind themselves to rebate all

interest on note in complaint described, and the payments that have been made to be applied upon the principal of said note.

(6.) To further secure the payment of said note, the defendants agree to cause one George W. Allen to execute and deliver to plaintiffs a mortgage of one undivided one fourth interest in the Highland and Pine Grove Fluming Company of Madison County, M. T.

It will be observed that the note, as a distinctive, separate obligation, is nowhere lost sight of in this agreement. The rate of interest is changed from five to three per cent. per month, but the note is still to bear interest and to be in full force and operation for that and all other purposes. The time of the payment is delayed for one year, but at the end of the year the amount due thereon could have been demanded, and can it be doubted that a suit thereon could have been instituted and payment enforced, notwithstanding this agreement?

The full force and effect of this agreement was to extend the time for the payment of the note, and to reduce the rate of interest thereon, and it operates simply as collateral security to the note. The note was due. The plaintiff promised to delay payment, but in consideration of such promise, he was to receive a mortgage against Allen, and the note against Vanderlip and McEvily was to be paid.

The agreement operates to place in the hands of the defendants the means whereby to pay the note, and every purpose and intent thereof was to create security for the payment of the note; and if there has been a failure to perform this agreement by the plaintiffs, on their part, an action could be maintained against them thereon; but whether the agreement itself fixes the measure of damages, and whether it could be set up as an equitable defense to this note, it is not now necessary to determine.

The agreement operates to delay the payment of the note, and where the promisee of a note, payable at a day certain, contracts, at the time the note is given or after it has become due, not to demand payment of it until a certain time after its maturity, such conduct is a collateral promise, for the breach of which, if there be a legal consideration, an action may lie, but it will not bar an action on the note when due by the terms of

it: 4 Mass. 414. An agreement, to operate as a merger of a note, must be such a one as by its terms, or by its legal intent and meaning, would defeat a right of action on the note.

This agreement was offered and received in evidence to support the allegation of the answer, that the agreement released defendants from all liability on the note. We are of opinion that the agreement does not operate to that extent, and that it does not support the allegation of the answer; and upon the principle that the evidence offered must correspond with the allegations, and be confined to the point in issue, the agreement was improperly received in evidence under the pleadings in the case.

It may be proper to remark that, although the damages that may have resulted to the defendants by a breach of this contract on the part of the plaintiffs may have been set up as an offset to the note (a question we do not think necessary to decide), yet there are no allegations of damages for the breach of said contract in the answer, which would entitle the defendants to prove the same.

The order overruling the motion for a new trial is set aside, judgment reversed, and cause remanded for further proceedings.

Exceptions sustained.

1. Liability of common carrier for loss of gold dust: *Fay v. Steamer*, 2 M. R. 417. Innkeeper liable: *Pinkerton v. Woodward*, 33 Cal. 558.

2. Passing counterfeit, without guilty knowledge, no offense: *People v. Sloper*, 1 Ida. 158.

3. Indictment for having instruments in possession for counterfeiting: *People v. Page*, 1 Ida. 102. Passing debased gold dust: *Same v. Same*, Id. 190.

4. Stealing from U. S. mails: *Farnum v. U. S.* 4 M. R. 192; *U. S. v. Montgomery*, 3 Saw. 544.

5. Gold dust named as consideration in a deed, held equivalent to currency, not to coin: *Taylor v. Holter*, 3 M. R. 322.

6. Gold dust is not "cash," but merchandise; but may by conduct of parties be treated as money: *Gunter v. Sanchez*, 1 Cal. 45; *Huff v. McDonald*, 22 Ga. 131; *Post TENANT IN COMMON*; *Wendt v. Ross*, 33 Cal. 650.

7. Not regarded as "net profits" or the same as "money received": *Fletcher v. Hawkins*, 2 R. I. 330; *Post PARTNER*; *Waring v. Cram*, 1 Pars. Eq. 516; *Post PROSP. CONT.*

8. Note payable in, not negotiable: *Houghton v. Ely*, 26 Wis. 206.

JANES V. SCOTT ET AL.

(59 Pennsylvania State, 178. Supreme Court, 1868.)

"Well and faithfully perform." A contract guaranteeing the faithful performance of a contract is not a mere guaranty of the skill and fidelity of the principal.

Previous suit against principal. Defendant guaranteed that Burke should fulfill a contract for sinking an oil well. Burke did not fulfill the contract. It was not necessary to liquidate the damage against Burke before proceeding on the guaranty.

¹ Insolvency of principal. Where the principal is insolvent at the maturity of the debt, neither judgment and execution, nor demand upon him, nor notice of non-payment to the guarantor, are necessary before suing the latter.

Accident—Act of God. A guaranty that the principal shall perform a work requiring skill, includes the accidents pertaining to the business, and the guarantor will be excusable only from those inevitable occurrences designated as the act of God.

Test of insolvency. The test of the insolvency of the principal debtor is what might be recoverable by process—not what it might be supposed he would do voluntarily.

October 20, 1869. Before THOMPSON, C. J., READ, AGNEW and SHARSWOOD, JJ.

Error to the Court of Common Pleas of Erie County, No. 125, to October and November Term, 1867.

This was an action of assumpsit, by William L. Scott and others against M. W. Janes, commenced December 4, 1865. The plaintiffs declared upon a guaranty by defendant for the fulfillment of a contract of one Burke to furnish the machinery, etc., and dig an oil well for them; they averred that Burke had not fulfilled his contract and was insolvent.

The contract with Burke was dated August 3, 1865; he was to furnish all the machinery, etc., and drill an oil well 4½ inches in diameter, to complete it to the depth of 620 feet, and to test it by pumping one week; and if then the well had to be dug deeper than 620 feet, the additional digging was to be prosecuted by Burke at \$6 per foot, he running all risks, and the test pumping to be done after the additional drilling; all the

¹ *Woods v. Sherman*, 71 Pa. St. 100.

machinery, etc., to be furnished at Burke's cost, and delivered to the plaintiffs on or before the 20th of September, 1865. The plaintiffs were to pay \$6,100; \$3,850 when the machinery, etc., should be on the ground, and the balance to be paid as the well went down at the end of each 50 feet, the plaintiffs reserving 25 per cent. until the completion of the contract, when the whole was to be paid. It was further stipulated that unavoidable accidents should be allowed for in computing the time for the completion of the well.

The guaranty was as follows:

"For a valuable consideration to me in hand paid, I guaranty to said second parties, their executors, etc., that said Burke shall well and faithfully perform his part of the foregoing contract.

"M. W. JAMES."

Burke was examined as a witness. He testified that he furnished the machinery, which cost him a little more than the first payment on the contract, and drilled 560 feet; on the 4th of October his tools got fast; he hired two skillful and experienced "tool fishers" to help him, and paid them \$100; they could not get them out and gave it up; he left the work on the 20th of October; he asked the agent of the plaintiffs for more money to help to get the tools out; the agent told him if he could not stay to put it into the hands of some good man; he went to the well, got sick, and assigned his contract to another man. He further testified that he was then not worth any property but a horse, had between \$400 and \$500 in money, was not in debt, had no judgments, and had always paid his debts, the plaintiffs retained 25 per cent. out of the money he had earned, and that he had received \$1,370 in addition to the first payment, but had drilled sixty feet for which nothing had been paid.

There was other evidence of the efforts made by Burke and that he did all that could be done to get the tools out. On the 4th of December, 1865, the agent of the plaintiffs gave Burke notice that as he had neglected to drill the well according to the contract they would take possession of the premises, complete the well at his expense, and hold him responsible for all damages accruing for the non-fulfillment of his contract.

Three of the defendant's points were the following:

2. The action being brought for damages for the non-compliance, on the part of Burke, with the contract with the plaintiffs upon the guaranty of the defendant, the amount of damages being uncertain, the plaintiffs can not sustain this action against the guarantor until they have established the amount of damages they have sustained by an adjudication in an action against Burke, and satisfactory evidence of the inability of Burke to pay the judgment.

3. If the jury believe from the evidence that Burke was prevented from finishing the well according to his contract by an unavoidable accident, and it was not caused by or for the want of ordinary skill or good faith, the plaintiffs can not recover in this case.

4. If the plaintiffs are entitled to recover at all, there can be no recovery beyond nominal damages, the plaintiffs not having proven any actual damages.

The Court (JOHNSON, P. J.) charged:

* * * "Our construction of that contract is, that it is an entirety, so intended by the parties, so clearly expressed in it, and proven by inference from that clause, in the latter part of it, which provides for an extension of time for the completion of the job in the case of accidents, etc., that might necessarily retard the work.

"As we interpret this contract, his pay for the job was contingent upon his success in completing it. He could not do part of it, quit and ask pay for what he had done. He did not complete it. (But it is said its completion became impossible without fault of his. His rimer stuck and could not be extracted. This is doubtless true; all reasonable effort was made to do so. But it does not follow the performance of his contract was thereby rendered impossible. There was plenty of room and opportunity to start and sink another hole to the required depth. This was to be allowed by the contract for just such a contingency. But he chose rather to forfeit the contract and abandon the work. The hole he made and the work he did was of no use or value whatever to the plaintiffs. He was therefore entitled to nothing for it. The plaintiffs were not bound to accept or pay anything for a hole part dug and then spoiled.)

"Nor am I prepared to say that if the accident was inevitable, and had rendered his performance of the contract impossible, that he would have been relieved from the operation of the same risk. But as no such impossibility existed the question does not arise.

("It is also argued on behalf of Burke, that he had not been paid up in full for the work he had done, and therefore had a right to quit and throw up the contract. It is enough to say in reply that he made no such allegation, and gave no such reason for quitting. Though a witness on the stand, he does not pretend there was money due him and withheld, or demanded and refused. He says he quit because his tools were fast, and he got out of funds and was discouraged. It is therefore unnecessary to go into any calculation to see whether he had been overpaid, as claimed by the plaintiffs, or had done work in excess of the payments made, as alleged by the counsel for the defendant.)

("The whole amount received by him was \$5,220; out of that he is entitled to credit of whatever he expended for engine, tools and derrick. Whether that was more or less than the \$3,850 paid in hand for that purpose, the jury must determine.

"For the balance, whatever it is, the plaintiffs would be entitled to recover a verdict if this suit was against Burke.)

("Are the plaintiffs entitled to recover it against the present defendant? His undertaking was also a contingent one, depending upon Burke's ability to pay the amount of his liability when this suit was brought. He testifies that he had no property except a horse, value not given. It is not unfair to presume the exemption laws would have protected that. He had \$400 of money, the proceeds of his labor in previous times, and no part of that received from plaintiffs. That could not have been seized without his consent.

"If a judgment had been recovered against him, would an execution for the amount of this claim, ranging from \$1,370 to \$2,000, or whatever sum you find the plaintiffs entitled to recover, have probably been paid or could its collection have been forced? These are questions entirely for the jury. If such an effort would have been fruitless, then the law does not require it to be made. The question of his solvency is not

confined to his ability to pay his other debts. But was he solvent for the payment of this claim? If so, this action can not be sustained. If not, the suit was rightly brought against the present defendant as his guarantor, without any previous proceedings against Burke.) The law as understood by us, and already stated in our general charge, requires us to answer the defendant's 2d, 3d and 4th points in the negative, and to give our approval to the first one."

The verdict was for the plaintiffs for \$1,527.55.

The defendant took a writ of error. He assigned for error the answers to his points and the several parts of the charge included in brackets; the last part being the 8th assignment.

J. C. MARSHALL and J. H. WALKER, for plaintiff in error.

The plaintiffs should have liquidated their damages by a suit against Burke: *Hoffman v. Bechtel*, 2 P. F. Smith, 193; *Kramph v. Hatz*, Id. 525; *Brown v. Brooks*, 1 Casey, 210; *Kirkpatrick v. White*, 5 Id. 176; *Gilbert v. Henck*, 6 Id. 205; *Stark v. Fuller*, 6 Wright, 320. The accident was unavoidable and was a defense: 2 Parsons on Cont., 184.

B. GRANT, for defendants in error.

The guaranty was to answer for Burke's failure to perform his contract without regard to the cause. The insolvency of the principal may be shown by any legitimate evidence.

The opinion of the court was delivered October 29, 1868, by THOMPSON, C. J.

We entirely agree with the learned judge below that the guaranty of the defendant, the plaintiff in error, was not a guaranty of mere skill and fidelity on part of Burke, the contractor, distinct from, or independent of performance, but that it was for the substantial completion of the contract according to its terms *ex visceribus suis*. This is imported in the terms used in the contract, viz., "that the said Burke shall well and faithfully perform his part of the foregoing contract." The contract distinctly provides for what was to be done. If any

thing be needed to sustain this interpretation of the words it will be found in the clause in the contract inserted for the benefit of the contractor — “unavoidable accidents to be allowed for in computing the time for the completion of the well.” If only skill and fidelity were guarantied this would be an unmeaning provision, for nothing more than the exercise of these qualities by Burke would have been required, and he could abandon the work without completing it, if he had fully exercised them. If the contract had been for skill and fidelity, the words used would only have extended to that, it is true; but it was for more; it was for the complete performance of a contract that Burke bound himself, and the guaranty was, that he should well and faithfully complete it, and if unavoidable accidents should occur, time should be allowed in addition to the contract time for doing and completing the work. There was no error, therefore, in thus construing the guaranty.

2. The next question we shall notice is that raised in the defendant's 2d point. The court below decided that correctly beyond doubt. The plaintiffs below were not bound to liquidate their damages by reason of the failure of Burke to perform his contract by a suit against him before proceeding on the guaranty of the defendant. They could do this by proceeding directly on the contract of guaranty as was done, setting forth in their *narr.* the failure on part of Burke to perform according to contract, and showing due diligence on their part to obtain redress from him, or such facts as would negative the idea of negligence in this particular. One way of establishing due diligence undoubtedly is by suit against the principal without remunerative results, and it is often the most conclusive. But this is usually for a different purpose than the liquidation of the claim. I have examined very many precedents in our books on this point, and I find quite as many cases in which suit on the contract of guaranty was the first step, as when suit was brought against the principal first. In *Brown v. Brooks*, 1 Casey, 210, it is said “when the principal debtor is insolvent at the maturity of the debt, no such proceeding (as judgment and execution) is necessary as a foundation to an action on the guaranty. Nor is it necessary in such a case to show even a demand on the principal debtor

and notice of non-payment given to the guarantor. This was decided in *Gibbs v. Cannon*, 9 S. & R. 198." We need not cite further authorities to prove this doctrine. This error is not sustained.

3. We also think the learned judge was right in instructing in the negative of the defendant's 4th point, which was, that the plaintiffs were only entitled to receive nominal damages, if anything. Of course, if the principal failed of performance the guaranty was to indemnify to the extent of the loss the plaintiff had suffered. If any recovery could be had at all, there was nothing in the case so far as we can discover, to reduce the same to nominal damages. The guarantor would not be excused from liability, excepting from those inevitable occurrences which are designated in law as the act of God. The accidents pertaining to the business—mechanical results—were the object of the guaranty. Burke undertook to do the work in the face of such contingencies as did happen, and agreed that he would perform notwithstanding, and the defendant guarantied his doing it. The principal failed to perform, and abandoned the contract. The guaranty was therefore broken. The loss of the plaintiffs was at the very least, what they had paid him, and this the court held the plaintiffs might recover. There was no error in this.

4. The last matter we shall notice is embraced in the 8th assignment of error. In substance, that is a complaint against the charge on the question of insolvency. Burke, the principal, being called as a witness by the plaintiffs, as we understand it, testified that at the time he abandoned the work he had a horse (value not stated) and \$400 or \$500 in money. How long he remained the owner of either was not stated. It was left as a question of fact to the jury on this evidence to say whether or not the plaintiffs would have been able by process to have recovered against him their damages; that is, such damages as the jury should be of opinion the plaintiffs had sustained if they had pursued him. The test would obviously be what might be recovered by process. They could not predicate a verdict of what they might suppose he would do voluntarily. This would be too uncertain. There is no legal presumption on the subject which would stand for proof. His character for honesty and the fact that he had always paid his debts would

not be sufficient to establish solvency without evidence of property. The term itself implies ability to pay, not mere disposition to pay. It was, therefore, not improper for the court to refer the jury to the existence of the exemption law, and the fact that the money in the pockets of the principal could not be seized, to enable them to determine whether, by process against Burke, the plaintiffs could have indemnified themselves from him for their loss. If they could not, he was insolvent. The plaintiffs were not bound to do a vain thing, and pursue him if he had no property which was available. If he was solvent, the court told the jury the action could not be maintained against the guarantor; if he was not, it could. The jury found for the plaintiffs, and must therefore have found him insolvent for all purposes of suit and process. We think this error is not sustained, and seeing nothing in any of the other specifications of error not specially noticed, we think this judgment ought to be affirmed.

Accordingly judgment affirmed.

SHARSWOOD, J., dissented as to 8th assignment of error.

1. Construction of a guaranty of one fourth of the profits of a mining adventure: *Fletcher v. Hawkins*, 2 R. I. 330; *Post* PARTNERSHIP.

2. A wrote to B that he had agreed to sell the Moselem Iron Co. certain ore, but that he felt doubtful as to the company's solvency. "We thought it best to write to you and get the information whether you would not guaranty us for what ore he will get." B replied by letter: "All right. Send the ore. Moselem will pay it; he is not insolvent": *Held*, that a guaranty was given: *McDowell v. Lehigh Valley Iron Co.*, 9 Rep. 357. (Supreme Court of Pennsylvania, 1880.)

3. Guarantor bound by his principal's acts; insolvency, demand and notice in guaranty contract considered: *Bushnell v. Church*, 2 M. R. 479; *Kincheloe v. Holmes*, 45 Am. Dec. 47, note.

IN RE OGLE'S ESTATE. TWADDELL'S APPEAL.

(5 Pennsylvania State, 15. Supreme Court, 1846.)

Fair mining securities allowed. Credit allowed for an investment by a guardian in a loan of a corporation owning coal lands and a canal, and chartered to carry on the business of mining, shipping and carrying coal—the company being considered at the time to be safe and the practice of investing therein common; though in three years and ten months thereafter they were obliged to suspend payment of interest by reason of inundations which destroyed their canal.

From the Orphans' Court of Philadelphia County.

February 25. The appellant, as guardian of a minor, filed his account in the court below, from which it appeared that in 1838 he had received from the estate of the father of the appellee about \$1,000, and in 1839, from that of Charles Ogle, a deceased brother, about \$1,000. He claimed a credit for a purchase made December 31, 1838, of Lehigh six per cent. loan of 1848, at \$101.25, amounting to \$3,200, and commissions on the whole estate at five per cent. On reference to an auditor appellant stated, under oath, that he was solicited to accept the office by the family, the guardian of an elder brother being in difficulties; that he consented with reluctance, and made the investment under the belief it was the best in the market; that he would have preferred it to the State stock or a mortgage if he had had money of his own to invest. The interest was regularly paid until October 21, 1841. That at the time of the investment the ward was advised of it, and made no objection until after he attained his majority. The transfer clerk of the company stated there were on the books upward of one hundred accounts of trustees, executors and guardians holding the loan; that it was thought safe and desirable, as the interest was paid punctually every quarter, and it was believed by the officers that it would eventually prove good. At the time of this examination it was selling at \$38.

It was admitted that appellant held no stock in his own name, this certificate having been taken in trust for the ward.

The estate of Charles Ogle, from which \$1,000 was received,

who died in 1838, amounted to about \$3,200. Of this, \$2,000 was invested in this loan. It was purchased by him in 1837. In a letter written shortly before his death he expressed a desire that funds to meet his wants might be obtained from his late guardian, as he "would be extremely sorry to sell the Lehigh loan stock."

The court below (PARSONS, J.,) declining to decide whether any other securities than those indicated in the act of 1832, could be resorted to, considered the decision in Nyce's estate (5 Watts & Serg. 254) ruled the case, adding: "We do not think the loan of the Lehigh Navigation Company could be considered that kind of security in which a prudent guardian or trustee would invest money. It was a private corporation; the stock was fluctuating and, in its character, to say the least of it, was uncertain and questionable. Therefore we think the auditor was right in refusing to allow the guardian a credit for it."

BOONE, for appellant, argued that the rule of this State had always been to protect the trustee when he acted in good faith and to the best of his judgment; but the court below seemed to think that the act of assembly had limited the species of lawful investments.

PER CURIAM. (The act does not make him liable for an investment beyond those mentioned; he must prove it was a safe investment.) Nyce's estate was under a will, and the decision is on the words of the special trust created; besides, that was in bank stock, while this is a loan to a corporation owning real property, on which its trade is founded: Lewin on Trusts, 307, 308; 3 Atk. 443; 1 Penna. Rep. 211. Here, too, it is shown that part of the funds had been previously invested by the donor in the same way.

W. A. PORTER, *contra*. The legislature has established a rule; if it is departed from it will require a decision in every case. The rule of the English chancery is settled, and requires no authorities. The reason stated as early as 3 Atk. 444, is exactly applicable. Nothing is trusted which may be wasted by the lawful acts of those on whom the value of the stock depends. All trading bodies, however secure, are ex-

cluded, because in the course of lawful traffic their estate may be lost. Precisely so here; a corporation trading in coal and transportation, the only object of its existence. Nyce's estate is much stronger, for there was the consent of the guardian; the corporation owned real estate, and was considered by the most sagacious, perfectly secure.

The rule is settled, if the court would not relieve at the time the act was done it will not interfere subsequently: *Howe v. Dartmouth*, 7 Ves. 137; where it is also said executors are expected to do what the court would order them to do: 10 Johns. 435; 2 Wend. 77; Willis on Trusts, 306, 309. There is not one of the almost numberless manufactories incorporated to the eastward which would not be held a good investment under the rule here contended for.

March 22d. GIBSON, C. J.

The legislature evidently intended not to restrict the investments of guardians, executors or trustees, to the securities designated in the act of 1832, or to require them in all cases without exception to be made under the direction of the court, but to point out a course free from risk, not to interdict every other one. It would be inconvenient and burdensome to saddle every petty re-investment of interest with the costs of a petition and the expense of a visit to the seat of justice or virtually to prohibit an investment in vacation. If the statute had been enacted for the benefit of the owner of the money it would have disappointed the framers of it; but it was made for the protection of the trustee, and not to entrap him. It is not intended here to say, whether money may or may not in any case be safely invested on merely personal security. The question is a grave one, for on the decision of it may depend the very existence of pecuniary trusts. The English rule may answer in particular parts of the State, but it is extremely doubtful whether any unbending rule will answer in every part of it. The investment here was not on personal security but in the loans of a great and flourishing corporation, the value of whose landed capital, to say nothing of its works, vastly exceeds the amount of its debts. The income from its coal mines and its canal is appropriated to payment of inter-

est on its loans in the first instance; and the investment was consequently made, in substance, though not in form, on real security. The investment in Nyce's appeal, which was thought below to rule the case, was made in the stock of a bank; and the history of banking for thirty years shows that it was essentially a hazardous one. Had the money, in the case before us, been invested in the stock of a company which can not receive a dividend till the interest on its loans has been paid, or had its dividends then been suspended, the case might probably have presented a different aspect. That it has since been compelled to suspend its payments has been occasioned by a dispensation of Providence which it was impossible to foresee or control. These are matters of history of which we are bound to take notice. The returning prosperity of the company makes the decision of the question a matter of small importance to the parties to it; but it is of immense importance to parties beneficially interested in trusts, that the trustees be held responsible only for supine negligence. It is ordered, therefore, that credit be allowed in the account, for cash and commission paid for the certificate of Lehigh loan; and that the account be reformed accordingly.

So decreed.

1. Adventuring the infant's estate in mining makes his trustee liable to account for the profits: *Wilkinson v. Stafford*, 1 Ves. Jr., 32; *Post TRUST*.

2. Infant held to a prospecting contract: *Breed v. Judd*, 1 Gray, 455; *Post PROSPECTING CONTRACT*.

3. Mining stock, under assessment, belonging to infant, is a kind of property which ought to be disposed of by sale: *Estate of Millenovich*, 5 Nev. 184.

TRUSTEES OF HAWESVILLE V. HAWES HEIRS. 193

TRUSTEES OF HAWESVILLE V. HAWES HEIRS.

(6 Bush, 232. Court of Appeals of Kentucky, 1869.)

If fee vested in the authorities, they hold the minerals. Where the fee simple in the town streets, and not a mere easement for purposes of the public, is vested in the trustees of a town, they are the owners of the coal underneath such streets.

Party leasing lands of stranger liable for the rents. Where coal is mined by lessees of persons claiming to be owners of the same, the real owners may waive the tort and sue the lessors for the rental received by them, as money had and received.

Legislature may vest the fee of streets. It is competent for the Legislature, with the assent or procurement of the owner of the soil, to vest the absolute title to the ground covered by the streets in the trustees of the town, and the act incorporating the town of Hawesville had this effect.

W. P. D. BUSH, for appellants.

G. W. WILLIAMS, for appellees.

Judge HARDIN, delivered the opinion of the court.

Richard Hawes, being the owner of the land on which the town of Hawesville, in Hancock county, is now situated, on the 5th day of November, 1827, executed the following writing:

"This certifies that in case a new county is established I will make a donation of seventy-five acres of land, as far as my right extends, beginning at the mouth of Lead creek, thence up as far as Mr. McQuady cultivates, and back square from the river. I to give one or two acres for public buildings, the streets, and half the lots, retaining the other half, and the ferry when established. This donation is for the express purpose of a county seat, and to be for that purpose only. Given under my hand this 5th day of November, 1827.

"RICHARD HAWES."

The county of Hancock having been established, and the county seat located as was contemplated, the town of Hawesville was incorporated by an act of the legislature, approved

¹ *City of Denver v. Clements*, 8 Colo. 472.

February 20, 1836, the "County Court of Hancock and the heirs of said Hawes having petitioned the legislature to establish the town by law;" and the land embraced by a plan of the town was declared by the act to be vested in the trustees of the town for the following uses and purposes:

"The public square, the streets and alleys in said town, to be held for the use of the public and the citizens of said town, and the lots to be conveyed by them, or a majority of them, for the time being, to the purchasers at the sale of the lots, or their assignees, upon the production of the certificates of purchase respectively, or to any one, upon the order of the Hancock County Court, for any lot designated upon the plan of the town as a donation lot, or upon the order of one or more of the heirs of said Hawes for any of those lots not designated as donation lots; and when said trustees, for the time being, or a majority of them, shall convey any lot in said town, the presumption shall be that they conveyed in pursuance of an order for making the deed by proper authority," etc.

It appears that in a division of the estate of Richard Hawes there were allotted and conveyed to the children of his deceased son, Aylette Hawes, "all the stone-coal and mines of stone-coal which exist or may be found in and under the lands formerly owned by said Richard Hawes, and of which he was the owner at his death, and which was devised by his last will in remainder to his devisees, situated in the county of Hancock, together with all and singular the rights of way in, through or over any of the said lands so owned and devised by said Richard Hawes, which may be necessary to the reasonable conveyance and necessary enjoyment of the said stone-coal and coal-mines."

Underlying the ground on which some of the streets of the town were located were beds of coal, which the grantors in said conveyance claimed as part of the property thereby conveyed to them; and their lessees having removed large quantities of this coal by mining under the surface of the streets, its value became the subject of this litigation between the appellants, who claimed it as the trustees of the town, and said children of Aylette Hawes.

In the judgment from which this appeal is prosecuted, the

TRUSTEES OF HAWESVILLE V. HAWES HEIRS. 195

court decided that the title to the coal underlying the streets and alleys of the town "did not vest in said trustees, either by donation made by Richard Hawes for the site of Hawesville, or by the act of the legislature establishing said town; but, on the contrary, that the right and title thereto remained in Richard Hawes until his death, and passed, by the deed and conveyance made in pursuance thereof, to the heirs of Aylette Hawes, deceased."

The trustees of Hawesville seek a reversal of that judgment on this appeal.

It is obvious that if the title to the streets and alleys was vested in the trustees, and not merely an easement over them for the use of the public, they owned the coal which was removed from beneath the surface of the streets, and might waive the tort committed by removing it without their consent, and sue for its proceeds as money received for their use.

If it be conceded that the conditional and prospective donation of Richard Hawes imported no more than a dedication of the ground necessary for public use as streets and alleys, and did not, *per se*, operate to divest him or his representatives of the legal title, we are nevertheless of the opinion that it was competent for the legislature, with the assent or procurement of Hawes' heirs, to vest the absolute title in the trustees of the town; and the act of incorporation had that effect: *McMillen v. Brown*, 1 Mar. 153; *Coleman v. Morrison*, Ibid. 406.

This conclusion is not in conflict with the general principle which this court has repeatedly affirmed, that the right of way for a public thoroughfare does not include the title to the ground over which it passes; the authorities cited for the appellees as illustrating that doctrine not being applicable to this case, but to a different class of cases, in which the title of the original owner in the soil and freehold has not been actually or constructively conveyed, and may be retained, and for some purposes enjoyed, consistently with an easement in the public.

Wherefore the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ROBERTSON ET AL. V. SMITH ET AL.

(1 Montana, 410. Supreme Court, 1871.)

Right of way over mining claims—Act of Congress construed. The defendants, as county commissioners and road supervisors, undertook to lay out a highway across the mining claims of the plaintiffs under the act of Congress of July 26, 1866, which provides: "That the right of way for the construction of highways over public lands not reserved for public uses, is hereby granted." The same act grants the right to explore and occupy the public mineral lands subject to local rules, etc.: *Held*, that the plaintiffs being in possession are presumed to hold in accordance with such local rules; that their rights having become vested by virtue of the grant contained in said act of Congress, their mining claims are no longer to the full extent public lands; and that neither the defendants, the Territory nor the general government could devote this ground to the use of a highway, without giving the plaintiffs a just compensation for all the damage done their rights.

¹ **Prior in time, prior in right applied to highways.** One who locates a mining claim on the public domain does not do so subject to the right of the public to construct a highway over the same. The proper construction is that miners have a right to occupy the public mineral lands, and the public have a right to an easement for a highway over the public domain, and whichever is prior in time is prior in right.

Liberal construction of the statutory grant. The grants to miners under the act of Congress are to be liberally construed in favor of the grantee.

The right to explore the mineral lands implies the right to extract the minerals when found.

The fee in possessory claims remains in the United States, but the rights of miners have been carved out of it.

The reserving clauses in the act as to "regulations" to be prescribed, and "local customs" explained and restricted.

² **Taking property without compensation enjoined.** Private property can not be taken for public use for the construction of a highway, in a Territory in which there are no statutes providing for the payment of a just compensation for the property taken, and an attempt so to do will be restrained by injunction.

Appeal from the District Court of Meagher County, Third Judicial District.

The plaintiffs, Robertson et al., recovered a judgment in July, 1871, before WADE, J., and defendants appealed.

G. G. SYMES and S. ORR, for appellants.

¹ *Coryell v. Cain*, 5 M. R. 227.

² *Titcomb v. Kirk*, 5 M. R. 10.

CHUMASERO & CHADWICK, for respondents.

KNOWLES, J.

This cause comes to this court on appeal from an order granting an injunction restraining the defendants from laying out and maintaining a highway over certain mining claims belonging to the plaintiffs. It appears from the record that plaintiffs and their grantors have claimed and possessed a mining interest in these claims since A. D. 1865. That they are in possession of them now, and that they have expended quite a sum of money in opening and in preparing to work the same. That defendants, Ford, Keene and Sterling, are the county commissioners of Meagher county, and as such had laid out a road up Cement gulch, being that upon which plaintiffs' mining claims are situated, and over these claims. That the defendant Smith was a road supervisor, and as such was proceeding under the directions of the above named commissioners to open said road. That there was granted by the legislative assembly of this Territory, subsequent to the location of plaintiffs' mining claims, a charter to certain persons to lay out and maintain a toll road up said Cement gulch, and that in pursuance of said charter these persons did open and maintain such road. That a subsequent legislative assembly repealed the act granting this charter, and by an act declared this road a public highway.

The defendants claim that by virtue of the provisions of an act of Congress, passed July 26, 1866, entitled, "An act providing for the right of way to ditch and canal owners, over public lands, and for other purposes" (see 14 U. S. Stat. at Large, 253), they were vested with the right to lay out and maintain this road. The section of said act which they claim grants them this right reads as follows:

SEC. 8. "That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

The first question then presented for our consideration is, were the lands upon which these mining claims are situated fully public lands?

The same act which grants this right to construct highways over public lands, grants to citizens of the United States, and

those who have declared their intentions to become such, the right to explore and occupy the mineral lands of the public domain, subject to such regulations as may be prescribed by law, and subject also to the local customs and rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States: 14 U. S. Stat. at Large, § 1, p. 253.

We hold that this section of that act grants to the proper person an easement upon such of the mineral lands belonging to the public domain of the United States as he may appropriate, in accordance with the local rules and customs of miners in the mining district in which the same may be situated, there being at present no regulations prescribed by law to vary or limit these. There is no point presented in this case that would imply that plaintiffs did not hold their mining claims, in accordance with the rules and customs of the miners in the district in which the same are situated. They being in possession of them, it will be presumed that they hold them in accordance with such rules and customs, upon the same principle that the possessor of any real estate is presumed to be the owner thereof, until the contrary is shown.

This easement is one of a very extensive character, for it gives the owner thereof the right to occupy and explore such land. Being a right received by legislative grant, it should receive no narrow construction.

The rule may be stated as a general one, in respect to legislative grants in this country, that they should be construed liberally in favor of the grantee, and in such a manner as to give them a full and liberal operation, so as to carry out the legislative intent, where that can be ascertained. See 2 Washb. on Real Prop. 539. Considering the history of mining for the precious metals in the mineral lands of the United States, and the history of the passage of the act under consideration, it can not be doubted that Congress intended by it to legalize the mining upon the public domain for precious metals, which up to the passage of the same had been carried on in such a manner as to make those engaged therein trespassers as against the general government. We may assert, then, that the grant to occupy and explore the public mineral

lands belonging to the public domain, carried with it, by implication, the right to take what was found by such exploration, namely, the precious metals; for, without this right, the grant would be of no utility to those it was intended to benefit. The only object any miner would have in occupying and exploring any mineral land, would be the extraction therefrom of metals therein contained. Without this right, the miner who does so would still be a trespasser against the general government. I am aware that in the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, in relation to franchises, the Supreme Court of the United States held, that a legislative grant should be strictly construed, and that nothing could be derived by implication from such a grant. Yet, in relation to legislative grants of this character, I believe that court would be more liberal. Certainly public policy would not dictate so narrow a construction. Yale, in his treatise on mining claims and water rights, maintains that this grant gives as extensive rights to the miner, in regard to extracting the precious metals from a mining claim, as those specified above. See Yale on Mining Claims and Water Rights, 355, 356.

This right to occupy, explore and extract from mineral lands the precious metals, is of a higher character than if created by what is termed a parol license, for it is given by an act of Congress; and hence, equivalent to a patent from the United States to the same.

"For the transfer, by the United States or by a State, of the title of land, no particular form is required. It may be done by special act of legislation, by a clause inserted in a treaty by the treaty-making power, or by patent issued by one authorized to represent the sovereignty:" 2 Washb. on Real Prop. 240.

Again; "A grant may be made by law as well as by patent issued pursuant to law:" 2 Washb. on Real Prop. 240.

Of course, this right to occupy, explore and extract the precious metals from the mineral lands belonging to the public domain is not unlimited. It is restricted by the local rules and customs of the miners of the district in which such land is situated. These rules and customs refer to the location, user and forfeiture of mining claims. When a miner locates

a particular portion of mining land, in accordance with these rules and customs, then the grant from the general government to occupy, explore and take therefrom the precious metals, accrues to such miner over the ground located. The effect of this statute, then, is to grant these rights over the ground located, in accordance with such rules, to as full an extent as if the land had been designated in the law.

While the general government then holds the fee in the land upon which these mining claims are situated, it has parted with an incorporeal hereditament in the same, that is, the right to occupy, explore and extract the precious metals therefrom; and these rights have become vested in the plaintiffs, by virtue of a grant from the general government; hence, these mining claims are no longer to the full extent public lands. The title in fee is but these rights, which were incident to the fee, have been carved out of it, and are no longer government property but that of the plaintiffs, and it is property which the law will protect. The use to which the defendants would devote this property would destroy plaintiffs' rights. The section of the act under which defendants claim their rights are granted does not devote any particular portion of the public domain to a highway. It gives a general right to the public of a right of way for that purpose over public lands, and should be construed only to offer to devote to that use any lands belonging to the general government, not reserved for public uses, that the public might, through its proper officers, select. Until the public then accepts the offer made, and seeks to devote some particular portion of the public domain for a highway, no rights accrue to the public over such lands. See *The City and County of San Francisco v. David Calderwood et al.*, 31 Cal. 585. No rights could have accrued to the public in the land, upon any portion of Cement gulch, until either the legislature declared the toll road up the same a highway, or until the said county commissioners sought to locate one there. We have seen, however, that before either of these events transpired, the rights of the plaintiffs had become vested. No greater rights could accrue to the public in these lands than the government had, at the time the public accepted the offer made in one of the ways above specified. The government, as we have seen,

had parted with an easement to plaintiffs. Neither the defendants as county officers, nor the Territory, nor even the general government, could devote this ground to the use of a highway, without giving the plaintiffs a just compensation for all the damage done their rights.

The defendants insist that any miner who locates a mining claim does so subject to right of the public, under the section of the law referred to above, to construct a highway over the same. There is no reservation of this kind in the grant to the miner. The clause "subject to such regulations as may be prescribed by law," reserves only the right to regulate the manner and conditions under which miners must work their claims by legal enactments. The clause, "subject to the local customs or rules of miners in the several mining districts," refers evidently to the rules, customs and regulations of miners in relation to the location, user and forfeiture of mining claims. By no rule of legal construction that I am aware of can these clauses be made to refer to a reservation of a right to the public to construct a highway over located mining claims. The proper construction of the law upon these subjects is, I think, that miners have the right to occupy and explore unappropriated public mineral lands; that the public have a right to an easement for a highway over the unoccupied public domain, and that whichever is prior in time is prior in right. It is as inconsistent for the public to claim a right of way over an appropriated mining claim without giving the owner thereof a just compensation for his rights, as it would be for a miner to claim the right to appropriate for mining purposes a portion of the public domain which had been devoted to the use of a public highway. The statute does not, by express terms, or by implication, make either of these rights superior to each other. There was no attempt on the part of the defendants to have the rights of plaintiffs sequestered for the benefit of the public upon giving to them a just compensation therefor. As far as we have been able to ascertain there is no provision in the statutes in this Territory which provides for the paying of a just compensation for private property which is sought to be devoted to a public use for a highway. Until there is some provision for this I do not see how private property can be devoted to the use of the pub-

lic for such a purpose, notwithstanding the necessity for such an appropriation may be very great. It would seem that it was a condition precedent that a just compensation should be given for private property before it can be taken for a public use.

It does not fully appear that the defendants claim that the public was subrogated to the rights of those persons who had constructed the toll road over these claims. However, if they do, the public could receive no greater rights than these parties had. It does not appear that they had any rights but the permission to construct their road over these claims and use it during the pleasure of the plaintiffs. The charter given to those persons could have given them no right to construct their road over these claims so as to damage the rights of plaintiffs, for a provision in a charter granting such a right would be the transferring of the property of one set of persons to another, and would be void as contravening the constitutional provision that no one can be deprived of his property without due process of law.

For these reasons the order of the court below is affirmed.

Judgment affirmed.

1. Minerals under toll roads belong to the adjoining land owner: *Kelly v. Donahoe*, 2 Metc. (Ky.) 482; *Smith v. City of Rome*, 7 M. R. 306.

2. Minerals under streets, in Iowa, go to the town in fee: *Des Moines v. Hall*, 24 Iowa, 235. Otherwise where the land has been specially dedicated "for street purposes only:" *Dubuque v. Benson*, 23 Iowa, 248.

3. Toll company may take stone from its road bed for repairs: *Stokely v. Robbstown Br. Co.*, 5 Watts. 546; but see *Kelly v. Donahoe*, *supra*.

4. A city may take stone from the bed of one street to use in repairing another: *Huston v. Fort Atkinson*, 56 Wis. 350; *New Haven v. Sargent*, 38 Conn. 50; 9 Am. Rep. 360. *Contra*, *Delphi v. Evans*, 36 Ind. 90; 10 Am. Rep. 12. See *Bissel v. Collins*, 28 Mich. 277; 15 Am. Rep. 217, note 219.

5. City liable for injury to private way by reason of its highway commissioner taking gravel therefrom: *Sprague v. Tripp*, 3 Am. Rep. 11; 13 R. I. 38.

6. Canal commissioners authorized to take stone from private lands, can not delegate such authority: *Lyon v. Jerome*, 26 Wend. 485; 37 Am. Dec. 271.

FUNK V. HALDEMAN ET AL.

(53 Pennsylvania State, 229. Supreme Court, 1866.)

¹ **Construction of complicated oil land contract—License made exclusive and irrevocable by the contract of the parties.** McElheny, being the owner of a farm composed of land in Cherry Tree and Cornplanter townships, in consideration of \$200, granted to Funk, his heirs and assigns, the free and uninterrupted privilege to go upon a tract of said land in Cornplanter township for prospecting, boring, etc., and taking any oil, salt, coal, etc., out of the earth; Funk to have the exclusive use of one acre of land around each pit or well, with free ingress on said land in common with McElheny; Funk. diligently to search for oil, etc., and give McElheny one third of all taken out, McElheny reserving the right of tillage. McElheny afterward conveyed to Haldeman all his farm subject to the agreement with Funk. Haldeman afterward agreed with Funk that his rights should include all lands in Cornplanter township (reserving a strip of ground), giving to Funk the right to transfer in whole or in part to others, and afterward granted to Funk the same rights in the Cherry Tree tract which he had in the Cornplanter.

- Held*, 1. The conveyances gave Funk an incorporeal hereditament in fee, which would have been indivisible at law, but was made divisible by the grants, and this interest which would also at law have been held in common with his grantors was made exclusive in Funk by the terms of the grants.
2. The grantors have no mining privileges, and can have none until Funk shall forfeit his rights by breach of covenant.
 3. The grants to Funk did not amount to a lease, nor a sale of the land or the mineral; no estate in the soil or minerals was granted. The right granted to Funk was to prospect for oil, extract and take it, rendering one third to the landlord.
 4. Funk's right was a license to work the land for minerals," coupled with an interest revocable only for breach of covenant.
 5. The \$200 paid was the consideration for the right of entry or privilege to bore for oil; the royalty was the consideration for the oil when found.

Forfeiture not enforced in equity. If a grantee has violated his tenure or his covenants, *e. g.*, if he has undertaken to divide into severalty that which he could only hold as an entirety, he has lost all; but even then, a chancellor would send the grantors to law to enforce the forfeiture. But there being no violation, either of tenure or covenants, there is, therefore, no forfeiture to enforce either at law or in equity.

¹ *Rynd v. Rynd Farm Oil Co.*, 5 M. R. 275.

This was an appeal by A. B. Funk, the complainant below, from the decree of the Court of Common Pleas of Venango County, in equity.

In that court Funk filed his bill against Levi Haldeman et al., praying for an injunction to restrain the defendants from interfering with complainant's working of certain valuable oil tracts, leased, as complainant alleged, to him. The defendants alleged a forfeiture by subletting.

Hon. JAMES CAMPBELL, P. J., granted the special injunction. The defendants filed a cross-bill, alleging that complainant had forfeited his right by subletting, and, after answers filed to the original bill and cross-bill, and testimony taken, the case was heard before Hon. ISAAC G. GORDON, P. J., who delivered an opinion dismissing the original bill, and declaring a forfeiture as averred in the cross-bill.

From this decree Funk appealed. The question involved was the proper construction to be given to the papers under which Funk claimed the right to dig for oil upon the lands. He contended that he was lessee with right to assign.

The landlords contended that Funk held under a mere license: that his letting other parties in was a surcharge, and worked a forfeiture.

It was stated that upward of \$9,000,000 depended upon the decision.

The title was thus described in the pleadings:

The bill set forth that October 8, 1859, David McElheny was the owner of a farm, originally consisting of two pieces; one situated in Cornplanter township, the other in Cherry Tree township, Venango county; the said pieces together constituting the farm of said McElheny, on each side of Oil creek; and on that day McElheny and wife made with Funk an agreement bargaining and selling, in consideration "of \$200, to Funk, his heirs and assigns, the free and uninterrupted use, privileges, etc., to go on any part of the 200 acres for the purpose of prospecting, digging, etc., to find any ore, oil, salt, coal, or other minerals, and of taking the same out of the earth," and the exclusive use of one acre of land at each well, with free ingress, etc., over said land by Funk, his

hands, teams, tenants, and under-tenants, occupiers or possessors of said wells, etc.

Funk bound himself to commence operations the next spring; to put a steam-engine in operation; to use energetically all reasonable efforts to obtain the oils, etc.; to give one third of all that should be taken out to McElheny; that if the experimenting failed the "premises should revert back" to McElheny, and McElheny to have the privilege of tilling the land, subject to the rights of Funk.

The bill further alleged the payment of the \$200 by Funk, a conveyance of the land by McElheny to Hussey, McBride & Haldeman in fee, subject to the above agreement, and an agreement between them and Funk, March 26, 1860, confirming the former agreement, with power to subdivide and sublet the land in whole or in part.

The bill also averred that Hussey, McBride & Haldeman, March 29, 1860, granted to Funk the oil and mineral right to said land.

The bill averred a performance by Funk of all his covenants; that Hussey, McBride & Haldeman pretended to doubt his right to subdivide and sublet the land, and that for the purpose of removing said pretended doubts Funk surrendered a strip of land to them, and they expressly gave him the right to assign and transfer the privileges granted to him, and to subdivide said lands, etc.

The complainant charged, therefore, that he had the *exclusive* right to dig for oil, etc., and the right to sublet, but that the defendants pretended that they had the right, in common with the plaintiff, to work any portion of the land not actually operated upon by plaintiff, and that in pursuance of said pretended right the defendants had entered on the premises, and commenced digging for oil, building houses, etc.

The bill concluded with the usual prayer for an injunction to restrain defendants from operating for oil, and from using any portion of the premises except for agricultural purposes, etc. To this bill the defendants filed answers and cross-bill, in which they alleged that the right to subdivide and underlet was given by them in the agreement of March 26, 1860, gratuitously and without advice from counsel, and they denied that large expenditures had been made by Funk before the

conveyance to him. They admitted that they had entered on the land to search for oil, that they had laid out lots, and had given parol licenses to build, but they denied that plaintiff's agreements gave him the exclusive right to dig, mine, etc. and averred that said instruments were mere licenses to search in common with defendants. They further denied the plaintiff's right to subdivide or underlet, and insisted that he had surcharged the tenancy of certain lots, and forfeited all right to the same.

An answer was filed by Funk to the cross-bill, and a large amount of testimony was taken.

The various agreements are recited at length in the opinion of the court. After the preliminary injunction had been granted, Funk sold his interest in the lands to the McElheny Oil Company, who were substituted as plaintiffs.

Upon final hearing, as already stated, the court dismissed the original bill, decreed a forfeiture as to two lots, and the complainants appealed.

The complainants were represented by Messrs. R. BIDDLE ROBERTS, THOMAS M. MARSHALL, ELI K. PRICE and Hon. WALTER H. LOWRIE.

F. CARROLL BREWSTER, representing one of the sub-tenants, was allowed by the court to take part in the argument.

The appellees were represented by Messrs. C. HEYDRICK, F. T. BACKUS and GEORGE R. SNOWDEN.

The case was argued at Pittsburgh, November 9, 1866.

THOMAS M. MARSHALL, F. CARROLL BREWSTER and Hon. WALTER H. LOWRIE, for appellants, argued that the cases relied upon by the court below did not justify the decree entered. They referred to those cases, viz.: *Lord Mountjoy's Case*, 4 Leon. 147; *Moore*, 174; *Godbolt*, 171; *And.* 307; *Co. L.* 164b; *Cheetham v. Williamson*, 4 East, 469; *Doe v. Wood*, 2 B. & Ald. 724; *Grubb v. Bayard*, 2 Wal. C. C. R. 81; *Grubb v. Guilford*, 4 Watts, 223; *Johnstown Iron Co. v. Cambria Iron Co.*, 8 Casey, 241; and showed that they differed from this, for in those cases,

1st. No present consideration had been paid.

2d. There was no word excluding the grantor.

3d. There was no covenant binding the grantees to take ore.

4th. There was no reservation of a right of tillage, as here. *Expressio unius exclusio alterius.*

5th. There was no clause in any one of those cases under which the lands, as here, were to "revert back."

They further argued that this case was not to be ruled by *Clement v. Walter*, 4 Wright, 341, for there the grantee had only paid a nominal consideration of \$1. He had never put up the works, and "what he was bound to take, and when, was uncertain." And that *Huff v. McCauley*, 53 Pa. St. 206, decided by this court since this appeal, did not rule this case, for in that case there was merely a verbal agreement by McCauley that Huff should take as much coal from McCauley's land as he wanted for his salt works.

They relied upon the recital of Funk's lease in the deed under which appellees acquired their title. They argued that Funk's rights were not those of a mere licensee, for, 1st. In a license there is no exclusive holding; here there is exclusion. 2d. A licensee is not bound to proceed; here, Funk was bound to use diligence.

But even if the court should construe this as a license, it could not be forfeited for doing that which the appellees had expressly permitted. That Funk's interest was expressly made divisible and exclusive in him and his assigns. If exclusive, there could be no surcharge, and no forfeiture for subdivision.

There is nothing strange or unusual in such a claim. Claims perfectly analogous to it abound in life and in judicial administration. Such are rights of coal, stone, gravel, salt, water, ways, pasture, fore-crop or prima tonsura, after-crop, fishery, oystery, ferry, water-power, flowage by drains, growing timber, growing crops, warren, turbary—many of them are very common in our State. The right to the land may be in one and these other rights in any number of others. No special forms are necessary in assuring such rights. In some cases they are real and in others they are incorporeal. Trespass and ejectment will lie where the right is exclusive. Judicial sagacity never allows the rules of legal art to set aside the common sense of the people.

Here two thirds of the oil belong to Funk, and one third to the owners of the land. Oil, like water, is essentially indivisible, and taking it in one place draws it off from all others;

and as the owner can not take oil from our wells, he can not steal the fluid rights by tapping at a distance.

They cited *Wilson v. McKreth*, 3 Burr. 1825; *Caldwell v. Fulton*, 7 Casey, 476; *Harlan v. The Lehigh Coal and Navigation Co.* 11 Ibid. 287; 2 Washburn on Real Property, 89; Woolrych, 116, 117; 5 Burr. 2816; 2 W. Bl. 1151; 8 Q. B. 1000; Cro. Jac. 150; 7 East, 200; 2 Wend. 524, 517; 17 Pick. 23; 9 Cow. 279; 17 Mass. 298; 8 Burr. 383; Angell, 108; *Butz v. Ihrie*, 1 Rawle, 218; 6 Cow. 677; 13 Pick. 323; 4 Ibid. 54; *Tyler v. Williamson*, 4 Mason, 403; *Bird v. Smith*, 8 Watts, 440; 14 S. & R. 267; 2 Story's Eq., Sec. 927; Brightly's Eq., Secs. 215, 296, 299, 300.

F. T. BACKUS and C. HEYDRICK, for appellees, argued that the admiration of the appellants' counsel for the opinion delivered by Judge CAMPBELL, had led them into error. The indenture of March 29, 1860, had been confounded with the indenture of March 26, 1860. The indenture of March 26, 1860, related to a tract in Cornplanter township. The indenture of March 29, 1860, related to a tract in Cherry Tree township.

Two questions arise out of the several agreements:

1. Were the privileges granted to Funk exclusive of his grantors, or to be enjoyed in common with them, and
2. If not exclusive, were they divisible as to the Cherry Tree township tract beyond the extent of the liberty expressly granted in the indenture of March 29, 1860.

The first question is common to all the agreements or deeds; the second arises only under the indenture of March 29, 1860.

1. As to the Cornplanter township tract. This was the only tract covered by the agreement of October 8, 1859, and the indenture of March 26, 1860. There was therein no grant of the oil or minerals, and nothing to exclude the owner of the soil from searching and experimenting there also. The language does not even purport to grant the right to take any oil out of the earth. It is but a liberty to experiment, and strictly an incorporeal hereditament: *Johnstown Iron Co. v. Cambria Iron Co.*, 8 Casey, 246.

The grant of the exclusive use of one acre of land around each well, does not enlarge the privileges before granted. The

previous grant would carry with it the right of ingress and egress, and the exclusive use of a reasonable curtilage appurtenant to each well. The exclusive enjoyment was to be after appropriation, but before that, the privileges were to be in common. Looking at all the parts of the agreement, we have a grant of the privilege of making an experimental search for oil in consideration of \$200, and constructively—not expressly—a grant of the privilege of taking any oil the grantee might find for another consideration, to wit, one third part of all that he might, under the liberty granted, find and take out of the earth, and no more. The title to the oil did not pass in fee under this grant. The \$200 was no part of the consideration for the oil; it was intended as compensation for disturbance arising from the exercise of the license to search and dig. In this, the court below are sustained by *Grubb v. Guilford*, 4 Watts, 423. The agreement does not require Funk to take any oils out of the earth, and after boring one well he might have refused to proceed. So, too, after having operated with one engine, he could not be required to multiply his operations.

He is the judge of the indications which are to justify him in operating, and of the circumstances under which the enterprise might be abandoned, as provided for in the agreement.

It is therefore manifest that Funk's covenant does not require him to take all the oil, and therefore he is not bound to pay for all. If McElheny then sold all the oil, it would be "a sale without consideration," and as such "is not to be held as intended by the parties unless the language of the instrument shuts us up to such a conclusion:" *Clement v. Youngman*, 4 Wright, 346.

Oil is not the subject of grant as a corporeal hereditament. It is a movable, wandering, fugitive thing in the bowels of the earth, and must of necessity continue common, like water, so that one can only have a usufructuary property therein: 2 Blackst. 18; *Lord Mountjoy's Case*, 4 Leonard, 147, is in close analogy to this case, but stronger in favor of an exclusive right. In *Chetham v. Williamson*, 4 East, 469, the grant is quite as comprehensive as to the one under consideration, and similar to it. *Doe v. Wood*, 2 B. & Ald. 724, has been misunderstood by appellants' counsel. See also *Grubb v.*

Bayard, 2 Wall., Jr., 96; *Gillett v. Treganza*, 6 Wisconsin, 343; *Caldwell v. Fulton*, 7 Casey, 476, sustains the appellees. The other cases cited are inapplicable,

1. Because the deeds purport to demise the land.
2. Because the landlord was necessarily excluded.
3. Leases for tillage are favorably construed on grounds of public policy.

They further cited *Bittinger v. Baker*, 5 Casey, 66. Funk could not divide any lot, and assign the smaller lot. This is shown by the cases already cited, and by *Van Rensselaer v. Radcliff*, 10 Wend. 639; *Leyman v. Aheel*, 16 Johns. 30.

It is no objection to the decree on the cross-bill that it enforces or declares a forfeiture: 1 Smith's Ch. Pr. 460; Story's Eq. 389, 391; 3 Daniel's Ch. Pl. and Pr. 1744-45; *Del. & Hud. Canal Co. v. Penn. Coal Co.*, 9 Harris, 131-146.

The opinion of the court was delivered January 7, 1867, by WOODWARD, C. J

These cases are a bill in equity and a cross-bill, which are founded upon the respective titles of the parties to valuable oil lands on Oil creek, in Venango county.

The first remarkable feature of the case (for the two bills constitute essentially but one case) is the magnitude of the conveyancing that has taken place. Not less than twenty deeds and agreements are presented in our paper-books as bearing more or less directly upon the questions discussed, all of which have been made since 1859, when the right of the present parties first attached. It probably will not be necessary to notice particularly all of these conveyances, but several of them must be carefully analyzed, and their legal effect fully stated, for in them the rights of the respective parties are rooted. And the principles of law appropriate to the case, and the mode of their application, are to be discovered only by a patient examination and comparison of the contents of several deeds.

On and before the 8th day of October, 1859, David McElheny was the owner and occupier of two lots or tracts of land, one lying on both sides of Oil creek, in Cornplanter township, Venango county, containing 100 acres, the other

lying on the north side of Oil creek, in Cherry Tree township, in said county, containing eighty-five acres, and the two together constituting his farm, though they touched each other only at one corner. To this latter lot, in Cherry Tree, McElheny had then only an equitable title, but he obtained the legal title on the 27th of the succeeding February.

On the 8th day of October, 1859, McElheny and wife entered into an instrument of writing with A. B. Funk, which is called an agreement, but is in form and substance a deed of conveyance, with mutual covenants. In consideration of \$200, the receipt whereof from Funk is acknowledged, McElheny and wife grant, bargain, and sell unto the said Funk, his heirs and assigns, "the free and uninterrupted use, privilege, and liberty to go onto any part of the 200 acres now owned, occupied, and in possession of the party of the first part, it being in the north part of Cornplanter township aforesaid, and lying each side of Oil creek, for the purpose of prospecting, digging, excavating, and boring, and erecting thereon frames, vats, engines, or anything necessary for the prospecting, experimenting, or searching to find any ore, oil, salt, coal or other mineral, and of taking the same out of the earth; also, we, the said party of the first part, do hereby grant unto the said party of the second part, the right, privilege, and exclusive use of one acre of land at and around each well or pit where the indications are such as will justify in operating or experimenting; and, also, the said party of the second part, his heirs and assigns, are to have free ingress, egress and regress on and over said land by himself, hands and teams, tenants and undertenants, occupiers or possessors of the said springs, mines, ore or coal-beds, in common with the said party of the first part, their heirs and assigns."

Then follow the covenants of Funk: that he will use no more land for roads or ways than shall be absolutely necessary; that he will commence operating the next spring, and will during the spring and summer put in operation a steam-engine on said land, and will energetically and diligently use all reasonable efforts to obtain the oils, ore, or minerals sought for; and if he succeed in finding or procuring any oil, ore, salt, coal, or other minerals, then, in addition to the \$200 paid, he agrees to give the one third part of all that is taken out of the earth,


on the premises, in barrels to be furnished by McElheny at the pit's mouth. Should the prospecting and experimenting prove a failure, and the enterprise be abandoned, Funk was to have the privilege of removing all engines, vats, and fixtures of every kind, and the premises to revert back to McElheny, whose right of tillage was in any event to be uninterrupted, except as to the one acre about each pit.

On the same day a supplemental covenant was made, that in case of a failure of the enterprise Funk was to fill in all the wells or pits he may have opened, "and in no case shall the said Funk be permitted to occupy any land within 100 yards of his (McElheny's) buildings."

Some question was made in the argument as to the territorial extent of Funk's rights under this deed—whether they extended to that part of the farm that lay in Cherry Tree township, or were limited to the part in Cornplanter township. Whatever might be the construction of the deed, if taken by itself, and subject to the rule that deeds are to be construed most strongly against grantors, we entertain no doubt that the deed, when taken in connection with subsequent conveyances hereafter to be noticed, is to be limited in its operation to that part of the McElheny farm that lay in Cornplanter township, and can have no effect on the eighty-five acres in Cherry Tree.

Such was the original grant out of which this controversy sprang; but, before pausing to notice its legal effect, it is necessary to bring several other conveyances into view.

On the 2d day of December, 1859, McElheny and wife entered into another "agreement" with John H. Dalzell and Thomas Donnelly, which began by fully reciting the prior agreement of 8th October with Funk, and then went on in the form of an indenture to grant, bargain and sell to Dalzell and Donnelly "the one half of the oil, salt, coal, or other minerals which may be taken from the said lands in accordance with the agreement of McElheny and Funk aforesaid;" and in case Funk should abandon his rights, Dalzell and Donnelly were to succeed them, and for the rights hereby conveyed to them they were to pay McElheny \$800. A subsequent clause defined that he was to convey only the one half of the portion of the oil, salt or coal which he should



receive from Funk. Such undoubtedly would have been the legal construction of the deed without the explanatory clause. It left in McElheny one sixth of what is called the royalty that Funk was to pay, and transferred the other one sixth to Dalzell and Donnelly, their heirs and assigns.

On the 28th day of January, 1860, McElheny sold and conveyed to William H. Ewing, in consideration of \$595, one twelfth of the royalty he was to receive from Funk, together with a right of succession to all Funk's rights in case he abandoned the enterprise, and Dalzell and Donnelly also elected not to take his place.

McElheny now retained to himself whatever interest in the freehold he had not conveyed to Funk, together with a right to one twelfth of all the oil, salt or ore Funk should take out of the earth. Then, on the 22d March, 1860, he and his wife, in consideration of \$20,000, conveyed, by indenture to Joseph G. Hussey, William D. McBride and Levi Haldeman, all of the State of Ohio, both of the tracts of land before mentioned, particularly describing them by metes and bounds, the one in Cornplanter, the other in Cherry Tree township, and subject only to the three before mentioned agreements—the first with Funk, the second with Dalzell and Donnelly, and the third with Ewing.

Four days after this deed had invested them with McElheny's proprietorship, to wit, on the 27th March, 1860, Hussey, McBride and Haldeman, with their wives, entered into agreement with Funk, that requires particular attention. It recites the conveyances by McElheny to Funk and themselves, and then follows this recitation: "And, whereas, it is mutually desired by the parties hereto, that the boundaries of the land covered by the aforesaid grant to A. B. Funk should be more definitely described, and that the part reserved and excepted from said grant should be more clearly ascertained and designated than is done in said recited instrument of writing by reference to perishable buildings;" then, therefore, it is covenanted and agreed that the "grant of rights and privileges unto the said A. B. Funk shall be deemed, considered and construed to cover, extend over and include all that certain tract of land situate in Cornplanter township, bounded and described," etc., by courses and distances, "excepting and

reserving from said grant all that part of said tract included in a strip forty-three rods wide, and extending along the south side thereof, from the east to the west line across the whole breadth of said tract, said strip being of the length of 137 perches, and of the depth of forty-three perches; and it is further agreed that within the said limits and boundaries aforesaid, all and singular the grants, privileges, provisions and stipulations in said recited instrument of writing contained, are hereby ratified, confirmed and renewed; and that, within the reserved strip aforesaid, said parties of the first part retain to themselves, their heirs and assigns, all the rights of ownership, as though none of the grants and agreements aforesaid had ever been made or entered into. It being understood, also, and hereby expressly agreed, that the said A. B. Funk, his heirs and assigns, at his and their discretion, are to have the right of assigning and transferring the rights and privileges herein granted, in whole, to any one or more parties, or to subdivide said lands into suitable lots, and assign and transfer his rights and privileges aforesaid, to be exercised and enjoyed by his assignees or transferees severally within the limits of such lots or subdivisions."

The next paper, dated 29th March, said to have been executed and delivered 5th May, 1860, was an indenture between Hussey, McBride, and Haldeman, and their wives, of the first part, and A. B. Funk of the second part, wherein the parties of the first part, in consideration of Funk's covenants, and of one dollar, granted to him the same rights on the tract in Cherry Tree township which McElheny had granted to him in the tract in Cornplanter township, and in the same terms substantially, reserving, however, from this grant, so much of said tract as is contained in lots marked and numbered 5 and 6 on a plot of a survey made by S. M. Irwin, dividing said tract into ten parcels, said reserved lots, 5 and 6, being about the center of said tract, and running from the creek to the northern boundary line, being of the width of thirty-six and six tenths rods, and containing together 23 acres and 145 perches, within which said lots, 5 and 6, said parties of the first part retain to themselves, their heirs and assigns, all the rights of ownership, as though none of the grants and agreements herein contained had ever been made or entered into;

but as to the other lots, marked Nos. 1, 2, 3, 4, 7, 8, 9 and 10, on the plot aforesaid, the said A. B. Funk, his heirs and assigns, are to have and enjoy all the rights and privileges herein granted, and the liberty of assigning and transferring said rights and privileges in whole, or as to any one or more of said lots, severally, at his and their option and discretion."

Then follow Funk's covenants to commence operating that spring, to put up a steam-engine on the land, to use all reasonable efforts to obtain oil, and to deliver to the parties of the first part one equal third part of all that is taken out of the earth on the premises, and to use no more ground for roads and ways than shall be absolutely necessary.

The agreement concluded with a stipulation that it shall not be construed as a conveyance of the "soil or land of the premises," or to interfere with the right of the parties of the first part to occupy buildings, and to till the soil of any part not actually used and occupied by said Funk; and in case of the abandonment of the enterprise, Funk is to fill up excavations, remove engines and fixtures, and the "titles to said lands shall revert to said parties of the first part, their heirs and assigns, as fully and effectually, to all intents and purposes, as if this present indenture had never been made."

On these several deeds it is to be observed:

1. That they limit Funk's rights under the original deed of 8th October, 1859, to the tract in Cornplanter township, and show that he acquired no right, by virtue of that deed, in the tract in Cherry Tree township.

2. That, as to the Cornplanter tract, his rights were extinguished in the part reserved, but as to all the rest of this tract, his rights were ratified, confirmed, and renewed, with the very important additional right to subdivide said lands into suitable lots, and to transfer them in severalty.

3. That the same rights were conveyed to Funk by the deed of 29th March, 1860, as to all of the tract in Cherry Tree, except twenty-three acres, 145 perches, reserved, being lots Nos. 5 and 6 on Irwin's plan, and that as to these lots he had no rights, but as to all the rest of the lots on Irwin's plan he had the same rights as had been granted and confirmed to him in the land in Cornplanter township, with the right of subdivision and alienation in severalty fully granted.

Hussey, McBride and Haldeman made leases to various parties of oil rights within their reservations, and Funk subdivided his territory (all the unreserved portions of both parts of the McElheny farm) into suitable lots, and let them to various parties, individuals, and oil companies, for the purpose of raising oil, all his lessees being bound to yield the appointed royalty to the landlords, and to divide with him as agreed by them respectively. I do not know that a more minute reference to these various leases, all bottomed on the conveyances we have gone over, would help us materially in defining the rights of the original parties.

But when Hussey, McBride and Haldeman, not content with mining for oil upon their *reserved portions*, claimed a right in common with Funk to mine *within his lines*, upon any land not actually occupied by him for mining purposes, and claimed, moreover, that Funk, by subdividing his rights, had forfeited them, so that neither he nor his lessees might lawfully take oil from *any part* of the premises, litigation became inevitable, and these bills were filed.

Two learned judges in the court below passed upon the questions arising out of this mass of conveyancing, and came to exactly opposite conclusions. For this reason, as well as on account of the intrinsic importance of the case, we have given more than usual attention to these questions, and I am now to state, first, the conclusions of the court, and then the grounds on which they rest. We are of opinion:

1st. That the conveyances vested in Funk, in fee simple, within the lines designated in the deeds, an incorporeal hereditament.

2d. That this interest, which would have been entire and indivisible at law, was made divisible by the terms of the grants.

3d. That this interest, which at law would have been held in common with the grantors, was made by the parties exclusive in Funk, his heirs and assigns, within the designated lines.

4th. That whatever may be rights of way, of tillage, and of building, reserved to the grantors within Funk's lines, they have no *mining* rights therein, and can have none until Funk, or those claiming under him, have forfeited their rights by breaches of their covenants.

Our reasons in support of each of these conclusions shall be stated as briefly as possible.

1st. The interest granted to Funk is an incorporeal hereditament. The first word that occurs in the definition of an incorporeal hereditament is "*right*." A *right* issuing out of a thing corporate, or concerning, or annexed to, or exercisable within the same. It is no part of the corporate thing; that remains as perfect, after the right has issued or been exercised, as before. The incorporeal hereditament, always a creature of contract, is a collateral incident which may belong or not belong to the thing corporate, without any visible alteration therein.

When this right takes the form that is designated, in the classification of incorporeal hereditaments, a "common," it is called a *profit* which one man hath in the land of another. Not ordinarily an exclusive profit, for in the instance of common of pasture, though an owner of the soil grant another common of pasture, *sans nombre*, yet the grantee can not use the common with so many cattle that the grantor shall not have sufficient common for his own cattle: 1 Co. Litt. 122.

Recurring now to the very language of the several grants, which I have quoted from the deeds, it will be seen to amount neither to a lease, nor a sale of the land, nor of any of the minerals of the land. No estate or property, either in the soil or minerals, was granted. If the grantor's dominion over these was not as complete after the grants as before, it was because of the *covenants* which restrained it, and not because of any title to either soil or minerals that had vested in Funk.

This is a matter of construction. It was argued that, upon the principles laid down in *Caldwell v. Fulton*, 7 Casey, 476, we ought to construe these grants as a conveyance of titles to the minerals; but the language will not bear it. There the grant was of all the coal in the land, for a sum *in solido*. We could make nothing more or less of it than a sale and conveyance, for a present consideration, of all that part of the land which the parties designated as "stone-coal," and though we have heard the ruling in that case repeatedly criticised, and have had occasion, very seriously, to reconsider it, we are to-

day more firmly persuaded than ever before that the construction of the conveyance there was the sound and necessary construction. But here the right granted was to experiment for oil, if found, to sever it from the soil, and to take it, on yielding a third to the landlord, as a *chattel*, not as any part of the realty. And the only possession to which the grantee was admitted was such as was necessary to the exercise of this right. The exclusive possession even of the acre about the pit's mouth was to terminate with an abandonment of the experiment; and the consideration for this right was not in the \$200 paid by Funk (that was only for the entry to experiment), but was to be measured by the oil taken from the ground. Herein it resembled the case of the *Johntown Iron Company v. The Cambria Iron Company*, 8 Casey, 241, much more closely than the case of *Caldwell v. Fulton*. As it was said, in that case, that no more ore was sold than should be raised, so it may be said here that no more oil was sold than should be raised. As to all not raised, there was no change of property; as to all raised, one third was retained and only two thirds were sold, and that as a chattel.

If Funk acquired no estate in lands or minerals, what is his right to be denominated? I answer, a license to work the land for minerals. Bainbridge, in his work on the Law of Mines and Minerals, p. 246, says: "There is a great distinction between a lease of mines and a license to work mines. The former is a distinct conveyance of an actual interest or estate in lands, while the latter is only a mere incorporeal right to be exercised in the lands of others. It is a profit *a prendre*, and may be held apart from the possession of land. In order to ascertain whether an instrument must be construed as a lease or license, it is only necessary to determine whether the grantee has acquired by it any estate in the land, in respect of which he might bring ejectment. If the land is still to be considered in the possession of the grantor, the instrument will only amount to a license, and though the licensee will certainly be entitled to search and dig for mines, according to the terms of the grant, and appropriate the produce to his own use on payment of the stipulated rent or proportion, yet he will acquire no property in the minerals till they are severed from the land, and have thus become liable to be recovered in an action of trover."

In the coal mining districts of Pennsylvania, leases for terms of years are very common. They are estates in land. The rent is usually measured by the tons taken, but the tenant is bound to a minimum production annually, and the transaction amounts to a sale, at a price per ton, of the coal in the premises, and constitutes an interest in the lessee in the nature of a corporeal hereditament.

But though we hold the papers in this instance to constitute a license, and not a lease, it is a license coupled with an interest; not a mere permission conferred, revocable at the pleasure of the licensor, but a grant of an incorporeal hereditament which is an estate in the grantee, and may be assigned to a third party. Even a parol license, without consideration, on the faith of which the grantee expends money, can not be revoked at the pleasure of the grantor, but will be enforced in equity: *Le Fevre v. Le Fevre*, 4 S. & R. 241; *Rerick v. Keen*, 14 Ibid. 271; and see *Wood v. Ledbitter*, 13 M. & W. 840, and cases in note.

Though this proposition is doubted, perhaps denied, in some of the States around us, it is not to be doubted that where large expenditures have been made under a *written license*, rights are acquired which will be upheld both at law and in equity.

2d. The second proposition is that the interest of Funk, which would have been entire and indivisible at law, was made divisible by the terms of the grants.

As to the first branch of this proposition, the indivisibility of such interests at law, Lord Mountjoy's case is the leading case upon which all our subsequent law on this subject is built. What was that case? According to ANDERSON, who as Chief Justice of the Common Pleas took part in the decision, and therefore ought to be the best reporter of it, there was nothing decided or said about the entirety and indivisibility of the mine rights in question. Lord Mountjoy, seized of two parts of the manor of Sanford, sold and conveyed them by deed to J. Brown and Charles Brown, with a proviso that it should be lawful for Mountjoy, his heirs and assigns, at all times, to have, take, and dig, in and upon the heath ground of the premises, sufficient ores, heath, turves and other necessities for the making of alum or copperas, and to build neces-

sary houses, etc. Mountjoy then, by deed, granted full mine rights in said manor to one Richard Leycolt, for the term of thirty-one years, the said Leycolt yielding therefor yearly to Mountjoy one half of the clear profits of his mining operations. The case, being before the Lords of the Privy Council, was by the royal command referred to ANDERSON, Chief Justice of the Common Pleas, and to PERYAM, Chief Baron, to certify their opinions on the disputed points. These justices reported that "we have divers times conferred thereon, not only between ourselves, but with some other justices," and are of opinion:

"1st. That said two parts were well conveyed to the Browns, absolutely, without conditions.

"2d. That Lord Mountjoy, by the assurance passed between him and the Browns, had a right in fee to dig turves, ores, etc., as mentioned in the proviso.

"3d. That Mountjoy might dig ore and other things for making alum and copperas as he should think fit.

"4th. That we and others that conferred are very doubtful and can not agree, whether any remedy by law is given for the things reserved by the indenture or no."

According to Anderson, these were the *only* points ruled in this famous case, and as he had studied the case with the aid of Ch. J. WRAY, of the K. B., Chief Baron MANWOOD, of the Exchequer, "*et autres*," and decided it for the Privy Council, he surely ought to know, better than any other, what the points in judgment were. Yet Lord COKE, who was of counsel for Mountjoy, reports the points ruled, not in his reports, but several years afterward, in his comments upon Littleton, and among them he states the following: "That Mountjoy might assign his whole interest to one, two or more; but then, if there be two or more, they could make no division of it, but work together with one stock; neither could Mountjoy assign his interests in any part of the waste to one or more, for that might work a prejudice and surcharge to the tenant of the land, and therefore if such an uncertain inheritance descendeth to two coparceners, it can not be divided between them. 1 Co. Litt. [Thomas' Ed.] p. 536."

This point has been stated by subsequent reporters, Godbolt, Leonard, Moor, and perhaps others, and has been taken for law by the courts, both English and American: *Chetham v.*

Williamson, 4 East, 469; *Doe v. Wood*, 2 B. & A. 789; *Grubb v. Bayard*, 2 Wallace C. C. R. 97; *Lyman v. Abeel*, 10 Johns. R. 31; *Caldwell v. Fulton*, 7 Casey, 475.

How are these discrepant reports to be accounted for? That Lord Coke was not superior to the professional infirmity which sometimes makes the "wish father to the thought" is shown by his frequent substitution of his own argument for the resolutions of the judges. In his reports it is often very difficult to distinguish the points ruled by the judges from *his* inferences and observations. *Southcote's Case*, 4 Coke, 83, is an instance in point, for which Lord Holt, in the great case of *Coggs v. Bernard*, 2 Lord Raymond, 915, rebuked his habit of "improving" upon cases and drawing unwarranted conclusions. It was probably a similar liberty he took with Mountjoy's case.

But, however this may be, it is certain that the courts in modern times have taken the law of that case from Coke rather than from Anderson, and it is now too late to correct the common error. We take it as it is ordinarily received, and we say that the grants to Funk, judged merely by the granting parts of the instruments, constituted an entire and inseparable interest. He might assign it to one or more, but, if to more than one, they must hold together as tenants in common of an impartible estate, like that in *Coleman v. Coleman*, 7 Harris, 100. To sever it was to destroy it. But the legal effect of the grant could be controlled by the agreement of the parties, and we think it was very essentially modified by what we find in some of the deeds. In the original agreement between McElheny and Funk, we find no stipulation for the divisibility of the interest granted, but in the confirmatory deed of 26th March, 1860, which was limited to the Cornplanter tract, it was expressly stipulated that Funk, his heirs, and assigns, at his and their discretion, have the right of assigning and transferring the rights and privileges herein granted, in whole, to any one or more parties (which was declaratory only of the legal effect of the instrument), "*or to subdivide said lands into suitable lots, and assign and transfer his rights and privileges aforesaid, to be exercised and enjoyed by his assignees or transferees severally, within the limits of such lots or subdivisions.*"

Now, it will be remembered that this deed withdrew altogether from Funk, so much of what McElheny had conveyed as was contained in the "reservation," but as to the residue of the Cornplanter lot, if he was not to have the right to subdivide it into lots, and grant them in severalty, the above words are unmeaning. His rights are called "lands," by which we are not to understand the title to soil or minerals, but the rights were to be subdivided by subdividing the lands in which they existed and were to be exercised. And such a subdivision might be made as would constitute his grantees tenants in *severalty*—the technical word for a sole, separate and exclusive dominion. "Suitable lots" mean lots fitted for mining purposes, and there is no allegation that the divisions made were unsuitable in this sense. Upon such a subdivision the power of partition, not inherent in the title originally, attached, and the exercise of so plainly granted a power can not work a forfeiture of estate. In Lord Mountjoy's case there was no similar provision, but only a grant and a proviso in the ordinary technology of conveyancing. Without impairing the effect of that case a jot, we are bound to give effect to *all* the terms in which these parties have expressed their intentions. It would be a superstitious reverence for the name of Coke to allow his report of Mountjoy's case to overrule the clearly expressed intentions of the parties now before us. He himself, if here, would "*note the diversity*," and we must not overlook it, nor fail to give it effect. The same observations are applicable to the deed of 29th March, 1860, relative to the tract in Cherry Tree, for there the division agreed on with Funk, and the power conferred on him to subdivide and to grant in severalty, are equally express and plain. And, as in Mountjoy's case, so in none that have followed it was there a similar condition of tenure.

3d. My third proposition has been somewhat anticipated already in what has been said. That Funk's interest would have been, by force of the mere terms of conveyancing, held in common with the grantors, is one of the deductions from Mountjoy's case which is not to be questioned, but that, by supplemental terms, the parties meant to make it *exclusive* in Funk, his heirs and assigns, is, we think, equally unquestionable. Nobody will doubt that this effect may be imputed

to a conveyance of such an interest. Says Bainbridge, p. 274, after reviewing the case of Lord Mountjoy and its English sequence: "It appears, therefore, that an exclusive right to minerals will not necessarily be conferred by the grant of a license to work them. But it must not be concluded, from these decisions, that the license to work may not be in such a form as effectually to vest in the grantee a sole and undisturbable right to the minerals. It may be generally laid down that, if it appear to be the intention of a deed of grant or license that the grantee should be solely and exclusively entitled to work for minerals, the grantor will be afterward precluded from abridging or derogating from his grant by any attempt to exercise a right, similar only indeed, but incompatible with its former disposition." And even at common law a man may prescribe or allege a custom to have and enjoy *solam vesturam terræ*, from such a day to such a day, and hereby the owner of the soil shall be excluded to pasture or feed there; and so he may prescribe to have *separalem pasturam*, and exclude the owner of the soil, or *separalem piscarium* in such a water, and the owner of the soil is not to fish there: Thomas' Co. Litt. p. 185. All incorporeal interests lie in grant, and if custom may impose the quality of exclusiveness, much more the terms of the grant may.

We take up these multitudinous conveyances, then, to discover what relations the parties intended to establish between themselves; and what do we find? We find the parties arranging for a full development of the oil in these lands. The owners cut off and reserve to themselves a part of each tract, in which they might mine for oil in their own time and way. They license Funk to enter upon the unreserved portions of each tract to experiment for oil, to subdivide his premises into suitable lots for this purpose, and to assign and transfer said lots, in whole or severally, according to his option and discretion, and then place him under covenants to erect machinery and fixtures, and "energetically and diligently" to use all reasonable efforts to obtain oil, and to give them one third of all that he raises. Exclusive possession of an acre around each well is expressly given to him. And the only rights of possession reserved to the grantors have reference to roads, buildings and tillage, nothing within Funk's lines being reserved

for the purpose of mining for oil. On the faith of this license, Funk, and others under him, incurred large expenditures, sworn in the proofs to have been between \$75,000 and \$100,000 in 1860 and 1861, and about \$700,000 since that time, and they have kept and performed all his covenants.

Now, although there is no *express* stipulation that his mining rights shall be exclusive of the grantors, is it not a fair and necessary inference from the premises? Is it conceivable that the parties meant that, when, after much labor and large expenditures, Funk should strike oil, the grantors might sink wells on the adjoining acre, and take not only a third of Funk's product, but all they could pump from their own wells, though they should dry up and ruin his wells altogether? If so, to what end were the premises so carefully marked out and divided between the parties? If so, what significance or value was there in the clearly expressed right to subdivide and assign to third parties?

Assuredly, Funk's lessees would not have gone on to operate upon the subdivisions if they had not thought they were getting exclusive rights therein. And the grantors would not have stood by in silence and seen their lessee and his sublessees expending time and labor and money upon the faith of an exclusive right, if they had not also understood the papers to vest such a right. Their conduct in this regard might, with considerable reason, be treated as an equitable estoppel, but as bearing upon the construction of the papers, it is exceedingly significant, and this is the light in which we are now contemplating it. Surveying the case all over, as presented in the bills, answers and proofs, it is impossible to account for the conduct of the parties, except upon the presumption that, up to a comparatively recent period, they construed the papers as conferring *an exclusive right to mine for oil within the lines marked out for Funk*. When we construe them in the same manner we are justified, therefore, by that best of all rules of interpretation—contemporaneous construction.

4th. The fourth proposition results as a corollary out of the former ones. If Funk's mining rights were exclusive within the lines assigned to him, it follows that the grantors can exercise no rights within those lines until a breach of the

covenants has been established. Whatever rights they possess relate to the surface, and as to subterranean treasures, they have excluded themselves, as an owner of the soil may be excluded from a *separalem pasturam* or a *separalem piscarium*.

Throughout this opinion I have treated oil as a mineral. Until our scientific knowledge on the subject is increased, this is the light in which the courts will be likely to regard this valuable production of the earth. But out of this results the difficulty of a strict classification of a right to take it as an incorporeal hereditament. If a mineral, it is part of the land, and a right to take land or any part of land, is not, strictly speaking, an incorporeal hereditament. Nor is the right to fire-bote, or plow-bote, or turves; and yet, for the want of a better classification, this is treated in law as an incorporeal interest. To the same head is to be referred these oil rights.

One other observation shall conclude this too long opinion.

The parties stand in a court of equity, and it is impossible to shut our eyes to the fact that what is asked for on behalf of Hussey, McBride and Haldeman is that we should declare a forfeiture of the rights granted to Funk; not, perhaps, a forfeiture in form, but in substance and legal effect a forfeiture.

If Funk has violated his tenure or his covenants—if he has undertaken to subdivide into severalty that which he could only hold as an entirety, he has lost all: for, unless he remained clothed with the *whole*, he had *nothing*. Even then, however, a chancellor would be likely to send the grantors into a court of law to enforce the forfeiture by ejectment: for equity does not ordinarily enforce forfeitures.

But upon full consideration of the papers, we are of the opinion that there has been no violation either of tenure or covenants, and therefore there is no forfeiture to enforce, either at law or equity.

And now, to wit, January 7, 1867, these cases having been argued and fully considered, it is ordered, adjudged and decreed that the decree of the Court of Common Pleas of Venango County, of the 19th of July, 1866, be reversed, set aside and taken for naught, and that the decree of the said court of

28th April, 1864, be restored and confirmed as the decree of this court in the appellant's bill, and that the cross-bill filed in behalf of the appellant be dismissed, and that the appellees pay the costs.

GRUBB V. GRUBB ET AL.

(74 Pennsylvania State, 25. Supreme Court, 1873.)

¹ **Grant of iron ore limited to a certain furnace, construed to create an incorporeal hereditament.** Clement and Edward Grubb owned in common "The Mount Hope estate," which consisted of several tracts of land, and one sixth of "three certain mine hills, known as Cornwall ore banks." Clement conveyed to Alfred his half of "The Mount Hope estate," designating the particular tracts, together with the right, "so far as the said Alfred's right under this conveyance in said Mount Hope furnace is concerned, of the said Clement to raise, for the use of said furnace, iron ore out of three certain mine hills, etc., known as the Cornwall ore banks, etc., but for so long and such time only as said furnace can be carried on, etc., by charcoal." *Held*, that this conveyance granted to Alfred a limited privilege to take ore, and did not convey the corporeal estate in the mine hills; that remained in Clement.

Collateral recitals in deed as evidence in partition. The deed from Clement to Alfred recited that Clement held the said land in common with Edward. In an action of partition by the heirs of Edward against Alfred, *held*: that the deed was *prima facie* evidence for plaintiff of the title of Edward's heirs.

Ore banks passed as appurtenances. In his declaration in partition the plaintiff demanded "The Mount Hope Estate," setting out the particular tracts and not the ore hills, but averred that each tenant was entitled to one eighth of the premises with the "appurtenances": *Held*, that the right to the ore in the mine hills passed under "appurtenances."

Error to the Court of Common Pleas of Lancaster County.

This was an action of partition, in which E. Burd Grubb, Henry B. Grubb, Charles R. Grubb, by Euphemia P. Grubb, their guardian, were plaintiffs, and Alfred Bates Grubb was defendant.

The writ, which was issued August 18, 1870, was for the partition of "an estate known and called by the name of Mount Hope, situate partly in Lebanon and partly in Lancaster counties, and composed of the following tracts of land,

¹ *Gloninger v. Franklin Co.*, 55 Pa. St. 9; *Post* LICENSE.

to wit: one tract situate partly in Rapho township, in Lancaster county, and partly in Lebanon township, in Lebanon county, adjoining lands of the heirs of Thomas B. Coleman, deceased, etc., containing one thousand and eighty-nine acres, with a furnace, etc.; one other tract, situate in Londonderry township, in Lebanon county, adjoining lands of the heirs of Thomas B. Coleman, deceased, etc., containing two hundred and seventy-three acres and twenty-eight perches, etc.; one other tract, situate in Londonderry township, in Lebanon county, adjoining lands of the heirs of Thomas B. Coleman, deceased, etc., containing two hundred and sixty-two acres and seventy-three perches, etc.; one other tract, situate in Lebanon township, in Lebanon county, adjoining lands of the heirs of Thomas B. Coleman, deceased, on all sides, and containing one hundred and thirty acres and forty perches, etc.; one other tract, situate in Londonderry township, in Lebanon county, adjoining lands of Thomas B. Coleman's heirs, etc., containing one hundred and twenty-five acres."

The declaration set out the writ, and that the plaintiffs and the defendant held "together and undivided the messuages and tracts of land aforesaid, together with the appurtenances, one eighth part whereof, the whole into eight equal parts to be divided, with the appurtenances, belongs to the said E. Burd Grubb," and so with the other parties.

The defendant pleaded "*non tenet insimul*"; he also pleaded specially, "that the tracts of land mentioned and described in the declaration of the plaintiffs do not constitute the entire Mount Hope estate, but are merely part and parcel thereof; that the said estate, in addition to the said tracts of land mentioned and described in the said declaration, comprises and includes the one undivided sixth part of three certain mine hills, situate in Lebanon township, in Lebanon county, and State of Pennsylvania, bounded on all sides by lands late of Robert W. Coleman, deceased, and William Coleman, deceased, and known and called by the name of the Cornwall ore banks, and held as a tenancy in common with the heirs of Robert W. Coleman, deceased, the heirs of William Coleman, deceased, and heirs of James Coleman, deceased, by Clement B. Grubb and the plaintiffs and defendant in this suit; that the several tracts of land mentioned and

described in the plaintiffs' declaration are, and for a long time past have been, used in and for the manufacture of iron by means of a smelting furnace thereon erected, and can be advantageously and profitably used only for that purpose; and the owners of the said Mount Hope estate have for a long time past owned, held and used the said tract of land in connection with the said undivided sixth part of the said Cornwall mine hills or ore banks, and as constituting with the same one single estate, and have obtained their supply of ore for the said furnace on the said tracts, erected from the said undivided sixth part of the Cornwall mine hills or ore banks. And if partition should be made of the lands demanded in the writ, without and apart from the said sixth part of the Cornwall mine hills or ore banks, the interest of the defendant in said Mount Hope estate would be seriously impaired and injured, and the defendant says that no partition of the said tracts of land in the writ and declaration mentioned, without and separate from the said sixth part of the Cornwall mine hills or ore banks, can legally be made."

The plaintiffs replied, traversing the special plea.

The case was tried October 21, 1872, before LIVINGSTON, P. J.

The plaintiffs gave in evidence a deed dated, October 29, 1845, between Clement B. Grubb of the one part and Alfred Bates Grubb of the other part, conveying to A. B. Grubb, for the consideration of \$25,000, one equal, undivided half part of the Mount Hope estate, now owned in common and equal interest by Edward B. Grubb and the said Clement B. Grubb, consisting of a furnace * * * and of the following lands thereto belonging, viz. (the tracts set out in the writ), which were adjudged and confirmed to Edward B. Grubb and the said Clement B. Grubb, their heirs and assigns forever, in the District Court for the city and county of Lancaster, in an action of partition of February term 1836, No. 44, in which the said Edward B. Grubb was demandant against Henry C. Grubb and Clement B. Grubb, etc. defendants, * * *.

Together also with the right, title and interest, so far as the said Alfred Bates Grubb's right under this conveyance in the

said Mount Hope furnace is interested and concerned, of them, the said Clement B. Grubb and Mary Ann Grubb, his wife, to raise, dig up, take and carry away for the use and advantage of said furnace, iron ore out of and from three certain mine hills, etc, called by the name of "The Cornwall Ore Banks," and held as a tenancy in common with the heirs of Thomas B. Coleman and James Coleman, deceased, with ingress, etc, to and from the said mine hills and every part thereof, for the purpose only of procuring ore for the said Mount Hope furnace, but for so long and for such time only as the said furnace can be carried on and be kept in operation by means of charcoal. To have and to hold the said one equal undivided moiety, etc., with the appurtenances and with the right of ore as aforesaid, unto the said Alfred Bates Grubb, his heirs and assigns, etc., * * * And the said Clement B. Grubb for himself, etc. does covenant, promise, grant and agree to and with the said Alfred Bates Grubb, his heirs and assigns, by these presents, that he, the said Clement B. Grubb, and his heirs, the said one equal undivided moiety, etc., * * * shall and will warrant and forever defend."

The deed was produced by the defendant upon notice from the plaintiffs.

It was admitted that Edward B. Grubb, who in the recital of the deed of October 29, 1845, was stated to be the owner of an equal interest in the premises conveyed by that deed, died intestate on the 27th of August, 1867, leaving four children, the plaintiffs and a widow.

The plaintiffs here rested.

The defendant offered in evidence the record of an action of partition, No. 44, to February term 1836 of the District Court of Lancaster county, in which Edward B. Grubb was plaintiff and Henry C. Grubb and others defendants, and in which one part of the premises demanded was "called by the name of Mount Hope," consisting of the several tracts claimed in this case, with others, including "the undivided sixth part of three certain mine hills, situate in Lebanon township, Lebanon county, bounded on all sides by lands of Thomas B. Coleman, and known and called by the name of 'the Cornwall Ore Banks,' and held as a tenancy in common with Thomas B. Coleman and the heirs of James Coleman deceased; which

said several tracts of land and ore banks constitute the estate called Mount Hope."

The offer was for the purpose of showing that, at the issuing of that writ, Edward B. Grubb considered the undivided sixth part of the Cornwall ore banks as part of the Mount Hope estate. The court rejected the offer and sealed a bill of exceptions for the defendant.

The defendant then offered to prove that "the ore for the use of the Mount Hope furnace has been exclusively derived from the Coleman, or Cornwall ore banks, in which the Mount Hope estate had an interest, from the erection of the furnace to the present time, and that the value of the Mount Hope estate, without the ore banks, is about \$30,000, and with the rights of the owners of the estate to the ore banks, worth \$130,000."

On objection by the plaintiffs, the court rejected the offer and sealed a bill of exceptions for the defendant.

Defendant offered, in connection with the proceedings in partition, before offered, to prove that the Mount Hope estate, of which the plaintiffs seek partition, was held to consist of the undivided one sixth part of three certain mine hills, situate in Lebanon township, Lebanon county, together with the several tracts of land described in these proceedings, ever since those proceedings in partition; and that Edward B. Grubb, the plaintiff in those proceedings and the ancestor of the present plaintiffs, and Clement B. Grubb as tenants in common, as well as Edward B. Grubb, A. B. Grubb, the defendants in these proceedings, who for twenty-two years so held, so considered and operated the iron works."

The plaintiffs objected to the offer, it was rejected by the court, and a bill of exceptions sealed for the defendant.

Testimony having closed, the defendant asked the court to charge the jury "that plaintiffs having failed to show title in themselves, they can not recover in this action."

The court charged:

"The plaintiffs in this action gave the defendant notice to produce the deed which they have offered in evidence and read in your hearing; it recites that the land in question, of which partition is sought in this action, was at the time it was made, held in common and equal interests by and between

Edward B. Grubb and Clement B. Grubb, and that by this deed C. B. Grubb and wife conveyed an undivided half part thereof to A. Bates Grubb, the defendant.

"It is also admitted, and in evidence before you, that Edward B. Grubb is dead, and that the plaintiffs are the whole of his children. The defendant has asked us to charge you that plaintiffs, having failed to show title in themselves, they can not recover in this action. We decline to do this, and say to you that, under the evidence in the cause, plaintiffs are entitled to your verdict."

The jury found for the plaintiffs.

The defendant removed the record to the Supreme Court by writ of error. He assigned for error the charge of the court and the rejection of his offers of evidence.

W. MACVEAGH and A. SLAYMAKER, also C. H. T. COLLIS, S. H. REYNOLDS, W. DARLINGTON and BLACK, for plaintiff in error.

H. M. NORTH, J. L. REYNOLDS and C. B. PENROSE, for defendants in error.

AGNEW, J., delivered the opinion of the court.

This was an action of partition by the heirs of Edward B. Grubb, in which the defendant pleaded the general issue and specially that the tract of land described in the declaration as an estate known and called "Mount Hope," does not constitute the entire "Mount Hope" estate, but a part of it only, and that the undivided one sixth of three mine hills, known as the Cornwall ore banks, have been owned, used and held together with it, constituting one single estate.

This plea the plaintiffs traversed, and raised an issue of fact, whether the undivided one sixth of the Cornwall ore banks formed part of the Mount Hope estate. The plaintiffs called for and gave in evidence a deed from Clement B. Grubb to Alfred B. Grubb, dated 29th October, 1845, reciting that the Mount Hope estate was then owned in common and equal interests between Edward B. Grubb and Clement B. Grubb. This deed described the same property set forth in the decla-

ration in this case, and in addition thereto conveyed the following mining right, viz.: "Together also with the right, title and interest, so far as the said Alfred B. Grubb's right, under this conveyance, in the said Mount Hope furnace is interested and concerned, of them, the said Clement B. Grubb and Mary Ann Grubb, his wife, to raise, dig, take and carry away, for the use and advantage of said furnace, iron ore out of and from three certain mine hills in Lebanon township, in Lebanon county, bounded, etc., known and called by the name of the Cornwall ore banks, and held as a tenancy in common with the heirs of Thomas B. Coleman and James B. Coleman, deceased, with ingress, egress and regress to and from the said mine hills and every part thereof, for the purpose only of procuring ore for the said Mount Hope furnace; but for so long and for such time only as the said furnace can be carried on and be kept in operation by means of charcoal." The plaintiffs rested on this deed, it being admitted, they were the children of Edward B. Grubb. The defendant, for the purpose of showing that the one sixth of the Cornwall ore banks was in fact a part of the Mount Hope estate, then offered in evidence the record of a partition to February term, 1836, between Edward B. Grubb and the other children of Henry B. Grubb, deceased, in which the premises called Mount Hope, including as a part thereof the one sixth of the mine hills, called Cornwall ore banks, were awarded to Edward B. and Clement B. Grubb. The court rejected this offer and excluded the record. The defendant then proposed to prove that the ore for the use of the Mount Hope furnace had been exclusively derived from the Cornwall ore banks, and that the Mount Hope estate, with these ore banks, was worth \$130,000, but without \$30,000. This offer was also rejected, and the court directed a verdict for the plaintiffs upon the evidence.

In consequence of the course the argument took, it has been necessary to state the attitude of the case thus precisely in order to extricate it from the volume of extraneous matter introduced by the defendant below. I have no doubt that the voluminous history of the title to the Mount Hope estate contained in the paper-books, down to the deed from Clement B. to Alfred B. Grubb, proves that it included the undivided

one sixth of the mine hills called Cornwall. But this deed separated the interest of Clement B. Grubb in the mine hills from the remainder of the Mount Hope estate, which passed by his deed to Alfred B. Grubb. By this conveyance he granted to Alfred only a special and limited right or privilege of taking ore for the use of the Mount Hope furnace, retaining in himself the corporeal estate in the Cornwall mine hills which he did not convey. Clement and not Alfred was therefore the co-tenant of Edward B. Grubb in the mine hills. The court then was right in rejecting evidence of the pre-existing state of the title and unity of the mine hills with the Mount Hope estate, and in holding that under the deed of 1845, Alfred B. Grubb did not hold these ore banks in common with the children and heirs of Edward B. Grubb. But it is argued, with much apparent force, this ought not to be, for the law will not suffer so great a wrong to be done to Alfred as to cut off the Mount Hope furnace from the mines which supply it with ore, thereby sacrificing, according to the rejected offer, \$100,000 in the value of the Mount Hope estate, for it is worth but \$30,000 without the mines, and the right otherwise would be worth nothing, for his privilege is annexed wholly to the Mount Hope estate. If this be true, then there must be a wrong somewhere under an apparent form of right. But we think the error is in assuming that by the partition in the mode being pursued, the mining privilege of Alfred B. Grubb will be severed from his estate in the Mount Hope furnace. This involves a consideration of the nature of his right, and the incidents flowing from it.

Without discussing at present the distinction between an easement and a right of profit *a prendre*, we may say that the mining right of Alfred B. Grubb is clearly a privilege annexed by the deed of Clement B. Grubb to the interest he conveyed in the Mount Hope estate, and will pass with it as appurtenant thereto. That it is not a right of profit *a prendre* in gross is manifested by the terms of the grant; for it is a right only to take ore for the use and advantage of the Mount Hope furnace, and the right of ingress, egress and regress is confined to the purpose of procuring ore for the furnace, and that so long as the furnace only as the furnace shall be operated by means of charcoal. That this is not a grant of the minerals themselves

in place is equally clear from the language of the grant, and is proved also by the cases of *Funk v. Haldeman*, 3 P. F. Smith, 229; *Huff v. McCauley*, Id. 206; *Johnstown Iron Co. v. Cambria Iron Co.*, 8 Casey, 241; *Grubb v. Guilford*, 4 Watts, 223; *Brandt v. McKeever*, 6 Harris, 70; *Caldwell v. Fulton*, 7 Casey, 475; *Washburn Easem.*, Ed. 1871, p. 10. Not being either a profit *a prendre* in gross, or an estate in the ore itself, it must rank in that class of easements wherein a right granted out of other land is expressly annexed to land.

A right of profit *a prendre*, which may be held apart from the possession of land, differs therein from an easement, which requires a dominant tenement for its existence: *Bainb. Mines*, Ed. 1871, p. 237. But a right of profit *a prendre*, if enjoyed by reason of holding another estate, is regarded in the light of an easement appurtenant to such other estate: *Wash. Easem.* Ed. 1863, p. 7. And says Mr. Justice Strong in *Huff v. McCauley*, *supra*, 209, some modern decisions have called it an easement though it was a privilege on another man's land with profit; and he refers to *Ritzyer v. Parker*, 8 Cush. 145, and *Post v. Pearsall*, 22 Wend. 425. It is immaterial, however, whether we call it an easement or a right of profit *a prendre* annexed to land. It is the same in nature, and is such a right as can be annexed to other land by express grant, and will pass as appurtenant to it. Even land itself, under some circumstances, may be so annexed to other land as to pass as an appurtenant: *Murphy v. Campbell*, 4 Barr, 480, 484-5; *Swartz v. Swartz*, Id. 353; *Cope v. Grant*, 7 Id. 488; *Blaine's Lessee v. Chambers*, 1 S. & R. 169; *Pickering v. Stapler*, 5 S. & R. 107; *Hill v. West*, 4 Yeates, 142, 146; *Grubb v. Guilford*, 4 Watts, 244. In this case the right is incorporeal, not being a grant of the ore in place, but of a mere right to dig and take it away for a special use, and is clearly annexed to the Mount Hope estate by express terms.

The declaration sets forth the Mount Hope estate with the appurtenances, in defining the respective interests of the parties, and the writ *de partitione facienda* will necessarily pursue the same description, and this will be followed by the final judgment in the same way. It follows that the mining right of Alfred B. Grubb will certainly pass with his interest in the

Mount Hope estate, according to the above authorities, as appurtenant to it, and consequently it must be valued and appraised along with the Mount Hope estate. It adds to the value of the land on which the furnace is erected in the same way that a right to back water on other lands adds to the value of a mill, or an alley or right of way appurtenant to a house in a city, adds to the value of the dwelling. In pursuing the partition in this mode no injustice can be done to the defendant, as the inquisition is under the control of the court and may be set aside if the jury fail to make the requisite valuation.

It is proper before concluding to say we have considered the objection so strongly pressed, that plaintiffs had shown no title in themselves, because Edward B. Grubb, their ancestor, was no party or privy to the deed from Clement B. to Alfred B. Grubb, and could not be estopped by the recital in it. But the recital that Clement B. and Edward B. Grubb were co-tenants in common in equal interests, is evidence, not on the ground of estoppel on either side, but simply as the admission or acknowledgment of Clement B., under whom Alfred B. Grubb derives title. Being a solemn declaration in writing of the tenancy in common, it is *prima facie* evidence, or presumptive of the title of Edward B. Grubb, and stands until it is disproved, just as in many similar cases.

Implications of title are not uncommon even in ejectment, where the plaintiff must recover on the strength of his own title: *Taylor v. Dougherty*, 1 W. & S. 324; *Hastings v. Wagner*, 7 Id. 216. Thus, where both parties claim under the same person, neither is bound to go behind the common source of title: *Riddle v. Murphy*, 7 S. & R. 230. A deed from the commissioners to sell the lands of John Nicholson, under the lien of the State, was *prima facie* evidence of title in him: *McHenry v. McCall*, 10 Watts, 456. Seizin and a descent cast, or a devise, are *prima facie* evidence of title: *West v. Pine*, 4 Wash. C. C. 691; *Cook v. Nicholas*, 2 W. & S. 27; and more to the point is *Patton v. Goldsborough*, 9 S. & R. 47, where it was held that it was competent to prove the verbal declarations of Dr. Smith, that the lot for which ejectment was brought was one of the four lots conveyed to his daughter by his deed of May, 1783, the deed having failed

to recite the numbers, and the original plan being mislaid, on which it was said he had marked her name within the lots.

Upon the whole case we discover no error, and

The judgment is affirmed.

1. Distinction between grant of right to mine exclusive of all others and the grant of a license: *Gloninger v. Franklin Co.*, 55 Pa. St. 9; *Post* LICENSE; *Johnstown Co. v. Cambria Co.*, 32 Pa. St. 241; *Post* LICENSE.

2. Ejectment not maintainable on behalf of incorporeal hereditament: *Union Co. v. Bliven Co.*, 3 M. R. 107.

See EASEMENT, LICENSE.

IRWIN ET AL. V. DAVIDSON ET AL.

(3 Iredell, Eq. 311. Supreme Court of North Carolina, 1844.)

Exceptional nature of mines, timber, etc. The general rule is that a court of equity takes no jurisdiction in cases of mere trespass, not even by granting a temporary injunction. But there is an established exception in the cases of mines, timber, and the like, in which cases injunctions will be granted to restrain the continued commission of acts by which the substance of the estate is destroyed or carried off.

¹ Plaintiff must support bill by ejectment. The plaintiff seeking an injunction as the legal owner of property must show that he has established his legal title by the judgment of a court of law, or that he is prosecuting his suit at law, and that the injury which he will sustain by the acts of the defendant before he can obtain judgment will be irreparable; and, in the latter case, the court in continuing the injunction must make such order as will insure a speedy determination of the suit at law.

Equity will not try title. A court of equity will not try the legal rights of parties to real estate.

² Mortgagee in possession—Tender. If plaintiff be a mortgagor and the defendant a mortgagee who alleges there is still a subsisting claim against the property, though an injunction may be granted to stay a wanton or improvident waste by the mortgagee in possession, yet the plaintiff must, before he entitles himself to relief, bring into court the amount due or offer so to do.

Insolvency and laches considered in their incidental relations to bill seeking injunction.

Costs do not follow the decree, the successful parties being blamable.

This was an appeal from an interlocutory decree of the Court of Equity of Mecklenburg County, his Honor, Judge Manley, presiding.

The case was as follows:

By an original bill filed August 25, 1844, it is charged that the defendant, William Davidson, was the owner of several tracts of land in Mecklenburg county, and particularly two tracts called, the one the Williams gold mine, and the other the Dunn and Alexander gold mine tract; and that by deed bearing date the 1st day of February, 1833, he conveyed the said lands to Joseph Curtis, James N. Hyde and

¹ *Emma Mine Case*, 7 M. R. 493; *Grey v. Northumberland*, 7 M. R. 251; *Ophir Co. v. Carpenter*, 4 M. R. 641; *Stevens v. Williams*, 5 M. R. 449.

² *Angier v. Agnew*, 98 Pa. St. 587; 42 Am. R. 624; *Capner v. Flumington Co.*, 7 M. R. 23.

Harry F. Talmadge; and the said Curtis, Hyde and Talmadge on the 4th of April, 1833, conveyed the same to an incorporated gold mining company, called The President and Directors of the Franklin Gold Mining Company, who entered into possession, and opened and worked certain gold mines thereon, and for that purpose erected thereon a steam engine and other machinery; and that the said William Davidson was a member of the company and the manager of its mining operations. The bill then states that the corporation became indebted to the plaintiffs in the sum of \$6,500.11, for which they obtained judgment in an action at law, and sued out execution, under which the plaintiffs became the purchasers of the said lands, and the sheriff conveyed the same to them on the 28th January, 1839. The bill further proceeds thus: "Your orators further show that, at the time of the sale, William Davidson was in possession of the premises as aforesaid, and that he has kept possession thereof in defiance of your orators, and used the same for his own individual purposes ever since; and that your orators have not as yet taken any steps to eject the said William by an action at law, hoping and believing that some arrangement would be made, either by the said company or some member thereof, to pay the debt to your orators, and take a transfer of their right under the sale, in which expectation they are disappointed, and in consequence they have now to look to the property solely for indemnity." The bill then states that William Davidson had then recently discovered a very rich vein of gold ore on the Dunn and Alexander tract, and had opened it and raised a large quantity of ore, and was still doing so, and grinding it with the steam-mill, and appropriating the proceeds to his private uses; and that the said Davidson was insolvent and not able to answer to the plaintiffs their damages therefor. The prayer is for a discovery of the quantity and value of the gold made by the defendant, and that an account may be taken between the parties, and a decree made for the amount that may appear to be due to the plaintiffs, and that the defendant may be enjoined from "using said property or any portion thereof, and from moving away any gold ore that he has taken out of the Dunn and Alexander mine as aforesaid," and for general relief.

Upon the bill and usual affidavit an injunction was awarded by a judge in vacation, as prayed for.

By a supplemental bill, filed September 3, 1841, the plaintiffs charge that upon notice of the filing of their original bill and of the award of an injunction, the defendant, William Davidson, and his single daughter, Sarah Davidson, who was living with him, took, in the name of the said Sarah, a lease for the Dunn and Alexander mine for the term of two years, from one Jane Dunn, who had no title whatever thereto, and then let one David Glenn into possession with William Davidson, and that they were working the mine on account of William Davidson, as before, or on the joint account of him and his daughter.

The bill charges that the giving and accepting of the lease was by collusion between all the said parties, and with the view of evading the injunction that had been issued on the original bill; and that neither of the said persons is able to pay any recovery the plaintiffs might effect in an action at law; and, therefore, that the injury will be irreparable to the plaintiffs unless the operations of the defendants should be stopped by an injunction, which the bill prays for accordingly.

Thereupon an injunction was granted against all the parties, restraining them from "further operations on the mines and land in the bill described, and from removing any of the ore already taken out of the mine;" and there was a further order that the sheriff should seize into his possession the said ore, and keep the same from waste, unless the plaintiffs and William Davidson should agree as to the terms on which the ore should be worked up and the proceeds divided, in which case the sheriff was authorized to deliver the ore accordingly.

The defendants answered on the 30th of August, 1844. William Davidson admits that he was once the owner of the lands in question. But he says that shortly previous to the sale and conveyance to Curtis, Hyde and Talmadge, as mentioned in the bill, he assigned and conveyed those lands, and all his other property, to Washington Morrison, as a trustee, in trust to secure and pay certain debts in the deed mentioned, and more particularly a very large debt which he, Davidson, then owed to the Bank of Newbern, and for which the plaintiff, Irwin, was his surety; that, at the time of the execution of the assignment, it was understood and informally agreed by the creditors and trustee that he, Davidson, might effect sales of the estate, and especially of the gold mines, as he

might deem to the best advantage, provided that the trustee should approve the contracts, and that the purchase money should be paid to the trustee, so that the same should be duly applied to the satisfaction of the debts. He states that under that authority he contracted with Curtis, Hyde and Talmadge (who were associated with others with a view to become legally incorporated as the Franklin Gold Mining Company) for the sale of the land and mines in question, at the price of \$25,000 in cash, payable in certain installments, and the further amount of \$10,000 in stock of the corporation when it should be recognized; that he communicated to his vendees the state of the title before the sale, and that they were satisfied therewith, and understood that they could not get the legal title unless the trustee should approve of the contract, and then not until they should have paid to him the purchase money; that Morrison did approve of and confirm the sale, and that he received at various times payments on account of it, amounting in the whole to \$20,000, but that the remaining \$5,000 of the purchase money has never been paid and is still due with the interest thereon, nor did any certificate of stock ever issue to him; that the corporation, in fact, consisted of the same association of persons with whom he contracted, with the addition of himself; and that Curtis, Hyde and Talmadge conveyed to the corporation, with the full understanding that the corporation was to make the residue of the payments for the purchase money. The answer states that all the foregoing circumstances were well known to the plaintiff, Irwin, at the time, or shortly after, they occurred; and that, at the time of the sheriff's sale, notice was distinctly and publicly given that a large sum remained unpaid of the purchase money, and that the legal title of the premises would not be conveyed until payment thereof, nor possession given until the balance should be paid or realized out of the property; and both of the plaintiffs fully knew all the said facts and circumstances. The answer admits that this defendant was a stockholder and manager of the corporation, and that after the sheriff's sale the operations of the company ceased, and that he has continued in possession ever since, for his own use, and claiming the profits in discharge of the sums due as aforesaid for the balance of the purchase money, and the stock in said company which he was to have.

The answer then states that the reason why the defendant did not sooner answer was, that there had been propositions of compromise pending between the parties, in which a sale to a third person was projected at the price of \$25,000; out of which the debt of the plaintiffs on the Franklin Gold Mining Company was to have been paid, leaving the residue for this defendant. The defendant denies that the lease to his daughter was of his contrivance or by his direction, to defeat the injunction.

Sarah Davidson, by an answer, admits that she took the lease from Jane Dunn, as charged in the bill; but denies that it was a contrivance to evade the injunction, and says that she took the lease because she believed Dunn had the title to the premises, and for the *bona fide* purpose of working the mine.

Glenn answers that he has no interest in the premises, and was employed by the other defendants, as miner, to conduct the work.

Upon the answers, the defendants moved to dissolve the injunction. But the court refused the motion, and ordered that it should be continued to the hearing, unless one or more of the defendants would give bond, with approved sureties, in the penal sum of \$10,000, with condition to perform such decrees as should be made in the case against either of the defendants, for the profits arising from working the mines in the pleadings mentioned. From that decree the defendants appealed.

IREDELL, for the plaintiffs.

BOYDEN, for the defendants.

RUFFIN, C. J.

The court is of opinion that the decree is erroneous. The bill is not founded upon an equitable title. It proposes to state a legal title in the plaintiffs, and assumes that they could undoubtedly recover at law, if they chose to bring an ejectment. The whole purpose of coming into this court, as appearing upon the bill, is to obtain an account of the ore already dug, and the profits made therefrom, which the plaintiffs claim as

the legal owners, and for an injunction against further working the mines, upon the ground that the defendants, by reason of their insolvency, will not be able to pay the damages which the plaintiffs may recover at law as legal owners. No privity between the parties is stated, but the defendants are mere trespassers. With respect to the first object of the bill, namely, the account, it is to be observed that we have nothing to do at present.

For although the plaintiffs be entitled to a recovery as to the profits, and also to an account and relief by a decree for payment, yet it does not follow that they are entitled to have, or rather to hold up an injunction, indefinitely, against a person, who is in the exclusive possession of the premises. The general principle is that a court of equity takes no jurisdiction in cases of mere trespass, not even by granting a temporary injunction.

But it is admitted that in cases of mines, timber, and the like, when the trespass consists in acts by which the substance of the estate is destroyed or carried off, there is an established exception, and that injunctions have been granted to restrain the continued commission of the trespass upon the grounds that it is an injury of the nature of destructive waste, and of irremediable mischief to the substance of the inheritance.

But it is plain that the jurisdiction to restrain trespasses, like that to restrain nuisances, is not an original jurisdiction of a court of equity, which enables this court, under the semblance of preventing an irreparable injury to a legal estate, to take a jurisdiction of deciding conclusively upon the legal title itself. Therefore, in such case the plaintiff ought to establish his title at law or show a good reason for not doing so; and if he will not this court can not undertake, against a defendant's answer, to try the questions of title and trespass and nuisance: *Drewry on Injunctions*, 238. In *Chalk v. Wyatt*, 3 Mer. 688, the defendant, who claimed as lord of the manor, was removing earth, shingles and stones from under a bank belonging to the plaintiff, which protected his land against the irruptions of the sea, and Lord Eldon granted the injunction in consideration of the irreparable injury the plaintiff was likely to sustain; but he said, at the same time, that he would not have granted it if the plaintiff had not

established his right at law by an action which he had previously brought and tried. However, it seems right to give an injunction even before a trial at law to prevent such irreparable mischief as, without the interference of the court, would be done before there could be a trial at law. But it is manifest that except in cases where equity assumes jurisdiction to prevent multiplicity of suits, or on other peculiar ground, the relief by injunction against trespass upon a legal owner ought only to be granted in aid of the defective legal remedy, and not to supersede the jurisdiction of the courts of law over a question purely legal; and, therefore, that the court of equity should only grant the injunction where the plaintiff is endeavoring to establish his title at law, and until he should have had a reasonable time allowed for that purpose. Hence, Mr. Drewry, page 186, observes that in such cases, where, from the nature of the circumstances, very great mischief may result to the defendant from the injunction being held up too long, the interposition of the court must be with considerable pressure that, on the part of the plaintiff, there shall be no delay in going to trial; and unless some means of procuring a speedy trial are insured, the court will not sustain the injunction. In the present case it seems extraordinary that the plaintiffs have brought no action of ejectment from the time they took the sheriff's deed in January, 1839, until last August, when this order was made, a period of more than five years and a half, during all which time the defendant has been in the exclusive possession, insisting upon an equitable right in himself and a legal title in his trustee. No reason is given for this singular conduct but one in very loose terms, intimating, however, sufficiently for us to understand, though vaguely, that the defendant held the possession either upon some agreement or understanding—perhaps not very definite—that the plaintiffs' purchase and conveyance from the sheriff should stand only as a security for the debt the company owed them, or that the defendant should pay them and take their title. Enough does not appear in the bill to authorize one to say that is its statement; if it had, perhaps it would be difficult to sustain the injunction at all, as it would show an equitable interest in the defendant. But unless something of that kind is

to be inferred from the bill it sets forth nothing as an excuse for not having sued at law; it holds forth no purpose of the plaintiffs to sue at law; and the order of the court lays them under no obligation thus to sue. What, then, is to be the effect of the decree in this suit? Either this court must, upon the hearing, try the legal title and decree upon the ground that it is in the plaintiffs, that the defendants surrender the possession to them, and thus turn this writ into an ejectment, strictly speaking, or the defendant must be left in possession of the premises without being decreed to do anything, but with an injunction upon him in the negative, that he shall refrain from further operations on the mine and land perpetually.

Such a decree as the former has been often refused; for this court will not sustain a mere ejectment bill; and a decree of the latter kind we have never known to be even asked for. It would be inconsistent with first principles, for it would leave the plaintiffs still under the necessity of going to law to recover the possession, with liberty to the defendant, of course, to show that they had not the legal title; and the consequence might be that persons who turned out to have no right themselves would have an injunction over another person, restraining him perpetually from all use of the property in his possession. The court upon the hearing, therefore, would be obliged to direct an action at law, and a trial of it within a reasonable time. And in a case of this kind, where the mines may be injured by suspending operations, and the steam engines and other machinery be ruined by not being kept in use and repair, the plaintiffs ought to be required to speed a trial, even if the application were recent after the injury alleged. But, certainly, after so great a lapse of time as five years and a half, it is wrong to keep up an injunction indefinitely without an offer on the part of the plaintiffs or a requisition on the part of the court that a suit should be brought. And, thus viewing the case, the insolvency of the defendant becomes immaterial.

Indeed, it is still more oppressive to a person in that situation, than if he were better off, to hold over him an injunction indefinitely, although the plaintiff will not, as he might, establish his title at law and turn the defendant out of his possession.

The case has thus far been considered as it is made by the plaintiffs themselves in the bill. The answer makes a case equally strong against the plaintiffs, though upon different principles. According to the answer, the plaintiffs, it is true, could not maintain an action at law, as they have not the legal title; but it is in Morrison, the trustee. Therefore, the plaintiffs had a right to come here in the first instance, if they had stated their case properly in the bill. But, then, if they rely on that disclosure in the answer, they must submit to all the other consequences of that statement. The legal title is held by the trustee for the benefit of both the defendant and his vendees; and as between the defendant and his vendees, as the legal title was purposely retained as a security for the purchase money, the defendant is looked on in this court as an equitable mortgagee, and as such had a right to enter into possession of the premises, as the means of compelling the mortgagor to pay the debt, or as the means of raising it out of the profits of the estate. If, then, the interest of the Franklin Gold Mining Company was the subject of sale under execution, the plaintiffs bought subject to the same equity which affected the company: *Freeman v. Hill*, 1 Dev. & Bat. Eq. 389; and, indeed, the answer states that they had distinct knowledge of all the circumstances. Therefore, as the defendant has the superior equity to be satisfied his debt for the residue of the purchase money, he may avail himself of his right as equitable mortgagee, and of the legal title of the trustee, to retain the possession unless the plaintiffs will redeem by paying the principal, interest, and costs due him. We speak thus upon the supposition that the debts secured in the defendant's assignment to Morrison have been paid, and that the trust resulted to the defendant; which, though not positively stated, we collect from the answer to be so, as the defendant speaks of the unpaid balance of the purchase money being his own. As to the stock in the company, which the defendant was to have, we presume that is now nothing, as we understand from the circumstances rather than from any particular statement in the pleadings, that the company is one of the many broken companies or bubbles of its day, in which the stock is not worth a copper. But, for the money balance of the price, certainly, the defendant has a right, as the title is

situated, to look to the property as a security, and, if so, his right is, to that extent, preferable to that of the plaintiffs. The circumstance that the defendant became a stockholder in the company makes no difference, for each stockholder has a capacity, as an individual, to contract with the corporation; and it does not appear that the stockholders were, by the charter, rendered personally liable for the debts of the corporation. It is true, also, that, even as mortgagee in possession, the defendant might be restrained from doing any act wilfully to the destruction or detriment of the estate, as felling ornamental trees, or making the mines ruinous by not keeping proper props or removing rubbish, or the like; because the land is only a security to the mortgagee, and is considered in this court as otherwise being the property of the mortgagor. But the mortgagee is doing nothing wrong in merely working the mine and thereby receiving money to be applied in sinking the mortgage debt. Such is the case before us, for the bill alleges no improper act in the defendant in the mode of working the mine, but it is merely founded on the allegation that the plaintiffs have the title, and that the defendant is insolvent, and therefore can not answer the plaintiffs' damages arising from his trespass. But until the defendant's debt has been paid, his insolvency can lay no foundation for stopping his operations, because all his earnings are immediately accounted for as credits on the debt the estate owes him. So, we think, in every point of view, the injunction should have been dissolved. As legal owners, the plaintiffs ought to have brought suit at law long ago, and asked only for an injunction until a trial could be had. As mortgagors, or the assignees of a mortgagor, or of one treated in equity as a mortgagor, they should have filed their bill to redeem, and offered to pay the principal and interest due to the defendant. We speak in reference to the defendant William Davidson, to whose situation alone these remarks are applicable.

As to the other defendants. Jane Dunn is in default in not answering, and this appeal brings up no question as to her. To the defendants Sarah Davidson and Glenn, it is now immaterial what becomes of the injunction, as the lease to the former had expired before the motion to dissolve. But they

were entitled, for the foregoing reasons, to be let loose by a dissolution of the injunction, though not with costs, we think. For notwithstanding the answers, we can not shut our eyes to the admitted facts, that the original bill was filed on the 25th of August and between that day and the 3d of September, the defendant, Sarah Davidson, a single daughter of the original defendant, and an inmate of his house, took a lease for the premises; nor fail, as persons of common sense, to infer therefrom that the purpose was to enable her father to proceed in working the mine as he did before, only in her name instead of his own; especially as William Davidson expressly states in his answer, that *he* has been in possession ever since the sheriff's sale, for his own use, as entitled to a balance of the purchase money out of the land. And we can not understand the equivocation on which the defendants, under such circumstances, can bring themselves to deny that, in taking the lease from Dunn, they had it as an object to evade the injunction. We can not doubt that it was an artifice in fraud of the process, and therefore we think that none of the defendants should be entitled to costs on the dissolution of the injunction.

This opinion will be certified to the court of equity, that further proceedings may be had in the cause accordingly.

PER CURIAM.

Ordered accordingly.

BISHOP OF LONDON v. WEB.

(1 Peere Williams, 527. High Court of Chancery, 1718.)

Lessee enjoined from converting the soil into brick. Lessee for years, though without impeachment of waste, may not destroy the land to the injury of the reversioner. Injunction issued to prevent the taking of the clay for brick.

Bishop Bonner, in the time of Edw. VI, being then bishop of London, made a long lease of some lands in Ealing, in Middlesex, in which there are about twenty years yet to come,

and the lease was made *without impeachment of waste*, and the defendant, Web. in whom, by several mesne assignments, the remainder of this lease was vested, articulated with some brick makers, that they might dig and carry away the soil of twenty acres six feet deep, part of the premises, provided they did not dig above two acres in the year, and leveled those acres before they dug up others.

The bishop of London, having the inheritance of the premises in right of his bishoprick, brought a bill to enjoin the digging of brick in this manor, alleging that this was carrying away the soil, part of the inheritance, and would in consequence turn the pasture field into a pit or pond; that it was like the case of *Vane v. Lord Barnard*, 2 Vern. 738, where Lord Barnard, having upon his marriage settled Raby Castle (the family seat) upon himself for life without waste, remainder to his first, &c., son of that marriage, afterward, upon some displeasure taken against his son, employed several persons to pull down the castle, upon which the court granted a perpetual injunction to stop him, and ordered him to amend and repair what he had pulled down; for that he should not destroy the thing itself, which he had expressly settled. So in this case the defendant, in digging all the soil for bricks, was actually destroying the field.

But for the defendant it was said, that frequent experience showed that the digging of brick did not destroy the field, there being many fields about the town where brick had been dug, and those fields now used again for pasture; but admitting it was waste, yet there being a power to commit waste, the lessee might do it, as well as open a new mine, and carry away the mineral without filling it up again.

On the other side it was replied, that the privilege of being *sans waste* would not, in equity, entitle one to pull down a house, or even cut down trees that are for the ornament of the house.

Lord Chancellor PARKER.—Before the statute of Gloucester, waste did lie against lessee for years, and the being without impeachment of waste seems originally intended only to mean that the party should not be punishable by that statute, and not to give a property in the trees or materials of an house pulled down by lessee for years, *sans waste*; but the resolu-

tion having established the law to be otherwise, I will not shake it, much less carry it further.

But I take this to be within the reason of *Lord Barnard's case*, where, as he was not permitted to destroy the castle to the prejudice of the remainder man, so neither shall the lessee, in the present case, destroy this field against the bishop who has the reversion in fee, to the ruin of the inheritance of the church.

Let the defendant carry off the brick he has dug, but take an injunction to stop further digging.

WENTWORTH V. TURNER.

(3 Vesey, 3. High Court of Chancery, 1795.)

¹ **Parties.** Tenant for life having made a lease of coal mines amounting to a forfeiture, can not join the remainder man in a bill for an injunction.

Tenant for life. Tenant for life, liable to waste, having sold timber can not prevent the vendee from cutting it.

Tenant for life made a lease of coal mines to the defendant.

Mr. King, on the part of the tenant for life and the remainder man in fee, who joined in the bill, moved for an injunction to restrain the defendant from taking coal, alleging that the lease was made by mistake, and was a forfeiture of the estate for life.

Lord Chancellor (LOUGHBOROUGH).—I can not help that; I can not hear a man coming to disaffirm his own lease. If tenant for life liable to waste had sold timber, he could not prevent the vendee from cutting it. It is collusion to bring forward the remainder man. If he complains he must file a bill alone.

¹ *Davis v. Leo*, 6 Ves. 787; *Lee v. Alston*, 1 Ves. 78; *Pigot v. Bullock*, 1 Ves. 479; *Irwin v. Covode*, 24 Pa. St. 162; *Post WASTE*.

MITCHELL v. DORS.

(6 Vesey, Jr., 147. High Court of Chancery, 1801.)

Trespass enjoined as well as waste. Injunction, where the defendant, having begun to take coal from his own land, had worked into that of plaintiff.

Mr. Mansfield and Mr. Bell moved for an injunction against the defendant, who, having begun to get coal in his own ground had worked into that of the plaintiff.

Lord Chancellor (ELDON).—That is trespass; not waste. But I will grant the injunction upon the authority of a case before Lord Thurlow;¹ a person, landlord of two closes, had let one to a tenant, who took coal out of that close, and also out of the other, which was not demised, and the difficulty was, whether the injunction should go as to both; and it was ordered as to both.

The order was made.

² GREY v. THE DUKE OF NORTHUMBERLAND.

(13 Vesey, Jr., 235. High Court of Chancery, 1806.)

Injunction against opening a mine may be granted when the working of a mine already opened would not be restrained.

Upon certificate of the bill filed and affidavit a motion was made for an injunction to restrain the defendant from opening a mine upon the plaintiff's copyhold land; the defendant being lord of the manor.

The Solicitor General (Sir SAMUEL ROMILLY), in support of the motion, admitting that the court would be very unwilling to interpose where a mine had been opened and was actually

¹ *Flamang's Case*, unreported, but often cited as the first case where trespass as distinguished from waste, was first enjoined; *Livingston v. Livingston*, 6 Johns. Ch. 499.

² S. C., *post* 251.

GREY V. THE DUKE OF NORTHUMBERLAND. 251

in a working state, the consequence of which might be irreparable mischief, insisted that under the circumstances appearing by the affidavits, only preparations made to open a mine by erecting sheds, etc., the court would upon the same principle, to prevent irreparable mischief, interpose; as the question whether the lord can without a special custom open a mine, ought to be tried at law; and the assizes for the county of Northumberland being held only once a year the trial can not take place before July.

The Lord Chancellor (ERSKINE).—Is there any case upon the point whether the lord can without a special custom open a mine? The effect might be a disinherision of the whole estate of the copyholder. Even without an authority I conceive the distinction between stopping the working of a mine already opened and opening, to be as it has been stated.

The Solicitor General mentioned the case of *Player v. Roberts*, Sir Wm. Jones, 243, as an express decision upon the point.

The injunction was granted.

¹ GREY V. THE DUKE OF NORTHUMBERLAND.

(17 Vesey Jr., 281. High Court of Chancery, 1810.)

²**No injunction without speedy trial at law.** Where the title is unsettled an injunction will not be continued where no means of insuring a speedy trial can be assured.

Severance—Rights of lord of the manor. Though the property in the minerals be in the lord of the manor, it does not follow that he can enter and take them without consent.

Upon a motion to dissolve the injunction in this cause, restraining the defendant, lord of the manor of Tynemouth, from digging coal upon the copyhold estate of the plaintiff, the following observations fell from the court.

The Lord Chancellor (ELDON).

The bill represents the defendant as being seized in fee of the manor, but that is corrected by the answer, stating him to

¹ S. C., *ante*, 250.

² *Irwin v. Davidson*, 7 M. R. 257.

be tenant for life under a marriage settlement, and therefore seized of the mines if they were vested in the lord for his life only. The only equity set up by the bill is that the defendant not having yet established his right at law, is proceeding to dig mines within the township of Backworth, which is admitted to be within the manor. The bill insisting that the lord of the manor has not a general right to the mines in that manor, but further, that, if he has a general right, he is not entitled to the mines of Backworth, which is alleged to be a distinct township, and then stating that if the defendant commits what the bill contends in effect, is trespass, the consequence will be irreparable mischief; and therefore the defendant is not to be allowed to break the soil, and erect buildings, and particularly engines, on the estate of the plaintiff, and should be restrained by injunction, until an action can be tried.

In continuing the injunction, I was influenced by the fact that the court has frequently interfered in the case of trespass by a local knowledge of the means of working coal mines, usually applied in that part of the country, and that the exercise of the right in the meantime would change, and deeply affect the property, and therefore it was proper that a trial should take place. On the other hand, the court is bound to attend to this consideration, that if the duke of Northumberland is seized in fee of the manor, inconceivable mischief may ensue from upholding the injunction too long, as the value of the opportunity of working a coal mine, if lost, may never be recovered; especially if it is contiguous to other mines belonging to the same person, and applying those considerations to the case of a tenant for life, it is clear that the interposition of the court must be with a considerable pressure, that on the part of the plaintiff there shall be no delay in going to trial. This principle was acknowledged in Lord Byron's case and many others.

I have looked at the report of the case in the Court of King's Bench in the year 1808, which decides nothing as to the right put in issue here; but from which I collect that the lord of a manor may be in the same situation with respect to mines as with respect to trees; that is, the property may be in him, but it does not follow that he can enter and take it without consent, which must be acquired by purchase or otherwise.

It was understood both by Lord Erskine and by me, that the action which had been commenced would try the question, but this unfortunate circumstance occurred: the pleader took the duke of Northumberland to be tenant in fee; as he is represented by the bill, and has averred him to be so in every plea. If the merits have not been tried from the fault of the plaintiff in equity, that presents a strong case for dissolving the injunction, and unless some means of procuring a speedy trial can be insured, I will dissolve it.

EARL COWPER ET AL. V. BAKER ET AL.

(17 Vesey, Jr., 128. High Court of Chancery, 1810.)

¹ **Removing stones from the sea-bottom enjoined.** Upon a bill, praying for an account and for an injunction to restrain a trespass in the nature of waste, brought by the lord of the manor and his lessees against the defendant for taking stones, having a peculiar value, from the bottom of the sea, within the limits of the manor, the Lord Chancellor granted the injunction until answer or further order.

The bill, filed by Lord Cowper as lord of the manor of Swacliffe, and his lessees, stated the title of Lord Cowper under a settlement in 1805, as tenant for life, without impeachment of waste, subject to a trust term, with power of leasing; that the manor extends along the seaside and into the sea as far as a buoy as big as a barrel can be seen; and that certain stones or argillaceous productions, called noddles of clay, are necessary materials for making a terras or cement, invented by James Parker, for which he had obtained a patent; that such stones are very scarce and valuable, and are produced upon and adhere to rocks within the limits of the manor, as well between high and low water mark as in the sea below low water mark; that they are, by the violence of the sea, separated from the rocks, and are found lying at the bottom of the sea and on the shore within the limits of the manor.

The bill further stated, that the patent will expire on the 28th of this month; that the plaintiffs, Charles Pearson, and his son, had taken a lease of the manor for one year; and the

¹ Injunction to preserve minerals held in solution: *Thomas v. Jones*, 1 Y. & C. Ch. 510.

defendants, Baker and Hill, have dredged up and otherwise collected, within the limits of the manor, large quantities of the stones; that the lords of the manor from time whereof the memory of man runneth not to the contrary have used the right of wreck, and also the sole and exclusive right of making oyster beds and taking oysters within the same limits. The bill then suggesting pretenses by the defendants, that they have taken small quantities of these stones from the manor, with other stones from other parts, and can not distinguish them, and charging that large quantities were taken from the manor, and that the defendants threaten to remove them so as to prevent the plaintiffs, the Pearsons, from ascertaining the amount, that they will be deprived of the benefit of their agreement and sustain irreparable damage, and that the plaintiff, Earl Cowper, will be prevented from demising the manor at so high a rent as he otherwise might, prayed an account of all stones or other argillaceous productions, collected and carried away from the sea or shore within the limits aforesaid since the 25th of March last, and an injunction.

Sir SAMUEL ROMILLY and Mr. GARRATT, moved for the injunction, upon affidavits, referring to the late cases, extending this jurisdiction to trespass, upon the ground of irreparable mischief in the nature of waste.

The Lord Chancellor ELDON made the order, granting the injunction until answer or further order.

THOMAS V. OAKLEY.

(18 Vesey, 184. High Court of Chancery, 1811.)

¹ **Jurisdiction—Waste and trespass.** The jurisdiction of chancery to restrain by injunction and to compel an account, in cases of the destruction or taking away of the substance of the estate, is no longer restricted to waste, but is extended to trespass.

Abuse of privilege. Injunction issued to restrain the unlimited taking of stone by defendant, who had a restricted right to take stone for certain uses in connection with certain lands.

¹ *Chapman v. Toy Long*, 1 M. R. 497.

¹ **Quarries.** If chancery will restrain by injunction, trespass committed in mining ore or coal, it will give the same relief against quarrying stone. No distinction on the question of comparative value can be made. **It is the practice to pray an accounting with the injunction, without separate suit at law for damages.**

The case stated by this bill was, that the plaintiff was seized in fee simple of an estate, in which there was a stone quarry; and the defendant, having a contiguous estate, with a right to enter the plaintiff's quarry and take stone for building and other purposes, confined to a part of his estate called Newton farm, had taken stone to a considerable amount for the purpose of using it upon the other parts of his estate, praying an injunction and account.

To this bill the defendant demurred.

Mr. HART and Mr. HORNE, in support of the demurrer, relied on the distinction between waste and trespass, this being a mere trespass, and the account too trifling to change the jurisdiction.

Mr. BENYON, for the plaintiff. The course of modern authority is to afford assistance in these cases of coal mines, timber, etc., to prevent irremediable mischief, an injury which damages could not compensate. In *Mitchell v. Dors*, 6 Vesey, 147, and many other cases, your lordship, following Lord Thurlow, gave relief, giving the injunction, where an action of trespass might be maintained; and the account follows the injunction; to prevent multiplicity of suits.

The Lord Chancellor ELDON.

The case has this specialty; the bill admits the defendant's right of entry into this quarry, and of taking stones for all the purposes of Newton farm, though, if he takes for any other purpose, undoubtedly an action would lie; but is there any distinction between this case and that of a coal mine? Is not this taking away the very substance of the estate just as much as in the case of a coal mine? After the decisions that have taken place, this demurrer can not be maintained. The plaintiff represents himself to be seized as tenant in fee of an

¹ *Purcell v. Nash*, 2 Jones, 116.

estate, in which there is a stone quarry that is parcel of the estate. He then states, which upon this occasion I must take to be true, that the defendant, having an estate in his neighborhood, consisting of Newton farm, among other lands, as owner of that farm has a right to enter into the quarry for the purpose of taking stone, as far as he has occasion for building and other purposes upon that farm; but the plaintiff represents that the defendant has taken stone, for the purpose of application, not upon Newton farm only, but also upon his other estates, and to a very considerable amount. That is trespass beyond all doubt, and not waste; as there is no such privity between the parties as would make it waste. His entry for the purpose of taking stone with reference to Newton farm is lawful; but if under color of that right he takes stone for the enjoyment, not of his farm only, but his other estates, his entry to that extent is unlawful, and his act a trespass; and, if it is settled that the court will interfere by way of injunction and account, this demurrer can not prevail.

The distinction long ago established was, that if a person still living committed a trespass by cutting timber, or taking lead ore, or coal, this court would not interfere; but gave the discovery; and then an action might be brought for the value discovered; but the trespass dying with the person, if he died, the court said, this being property, there must be an account of the value, though the law gave no remedy. In that instance therefore the account was given, where an injunction was not wanted. Throughout Lord Hardwicke's time, and down to that of Lord Thurlow, the distinction between waste and trespass was acknowledged; and I have frequently alluded to the case upon which Lord Thurlow first hesitated;¹ a person having a close demised to him began to get coal there, but continued to work under the contiguous close, belonging to another person; and it was held that the former, as waste, would be restrained; but as to the close which was not demised to him, it was a mere trespass, and the court did not interfere; but I take it, that Lord Thurlow changed his opinion upon that; holding, that if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which, in equity, he was entitled. The

¹ *Flamang's Case*, see 7 M. R. 250.

interference of the court is to prevent your removing that which is his estate. Upon that principle Lord Thurlow granted the injunction as to both. That has since been repeatedly followed, and whether it was trespass under the color of another's right actually existing or not.

If this protection would be granted in the case of timber, coals, or lead ore, why is it not equally to be applied to a quarry? The comparative value can not be considered. The present established course is to sustain a bill for the purpose of injunction, connecting it with the account in both cases, and not to put the plaintiff to come here for an injunction, and to go to law for damages.

The demurrer was overruled.

FIELD V. BEAUMONT ET UX.

(1 Swanston, 204. High Court of Chancery, 1818.)

Identity of mines shown by parol. Where there is a grant of mines under farms the identity of the mines is a question of fact, and may be decided by evidence *dehors* the deed.

¹ Injunction prevented by laches. To stop the working of a coal mine is a serious injury, and when it has been allowed to be worked for eight years, the expenditure is an equitable ground to prevent the hasty interference of the court.

Injunction sought by party refusing to produce documents. Whether, after a verdict at law in trespass, the court would grant an injunction in favor of parties who, at the trial, had refused to produce documents essential to a just decision, *doubted*.

By deeds of lease and release, dated the 30th of July, 1790, Sir Tho. Blackett granted to John Jarratt, Richard Hird and others in fee, all the coal mines in Cold Harbor farm, and also "in the several lands or grounds then in the several tenures or occupations of widow Kellett and son, Abraham Walker" and other persons named, tenants of his estate at Wibsey.

¹ *Clarke v. Hart*, 6 H. L. Cas., 655; 19 Beav. 349; 7 De G. M. & G. 232; *Anderson v. Simpson*, 21 Iowa, 405; *Post LICENSE*; *Parrot v. Palmer*, 3 M. & K. 632; *Real del Monte Co., v. Pond Co.*, 7 M. R. 452.

At the date of the release none of the farms were in the occupation of persons corresponding to the description of the widow Kellett and son, but one had been held by a family of the name of Kellett since 1742, and was then in the possession of Joshua Kellett, the son of a widow Kellett, who had occupied it jointly with the brother of her husband, till her death in 1788.

In 1808 the grantees caused pits to be sunk, and a steam engine to be erected on the farm so occupied, and proceeding to obtain coal, continued to work the mines without interruption till 1816, when the defendants, devisees of Sir Thomas Blackett, commenced an action of trespass against the plaintiff, the agent of the grantees, in respect of such mining. Previously to the trial of the action the plaintiff gave notice to the defendants to produce certain documents tending to prove that the farm in question passed by the description of lands in the occupation of the widow Kellett and son, but they were not produced, and the defendants obtained a verdict. On the 23d of January last, the Court of King's Bench, in consequence of the rejection at the trial of evidence tendered by the plaintiff, ordered a new trial (*Beaumont and wife v. Field*, 1 Barn. & Ald. 247), which was expected to take place at the ensuing York assizes, the commission day being the 7th of March.

The bill filed on the 9th of February last, stating these facts and that the farm in question was described in the rent books and other documents relating to the estate of Sir Thomas Blackett, as in the occupation of widow Kellett, and charging that the defendants had in their custody or power divers deeds, leases, rent books and other documents, by which it would appear that they ought not to maintain their action against the plaintiff, prayed an account and production of such deeds, etc., and an injunction.

The common injunction having been obtained for want of answer, the plaintiff on the 28th of February moved before the vice-chancellor that it might be extended to stay trial, and his honor having refused the order (*Field v. Beaumont et ux.*, 3 Madd. 102), the motion was now made before the lord chancellor.

Mr. BELL, Mr. HEALD and Mr. BUCK, in support of the motion.

The question is, whether the court will not, on the trial of a right, secure to parties applying in conformity to its rules, the production of evidence necessary to a just decision. The importance of these documents is obvious; to ascertain the tenants of particular lands at a given time, the proper evidence is the steward's books. Is it consistent with justice that the defendants, profiting by their refusal to produce the documents, which can not be withheld without a violation of the moral duty of a landlord toward his tenant, shall compel us to a trial of the question with imperfect proof?

No delay is imputable to the plaintiff. Before the first trial he had no reason to apprehend that the defendants would refuse to assist the justice of the case by the production of the evidence which he required. After the verdict it would have been vain to proceed in this court for compelling the production, till the court of law had granted a new trial. *Whitmore v. Thornton*, 3 Price, 221: "Where there is no trial to be had, there can be no discovery to be sought; and if a verdict had passed *simpliciter* without more, a bill then filed for a discovery might be demurred to, for there could be no discovery any more than as to a matter not at issue." Per RICHARDS, Baron, p. 248. The rule for a new trial was not made absolute till the 21st of January, and on the 9th of February the bill is filed. Even if delay had been practiced, the court would grant the order on terms. No evil can ensue from the postponement of the trial till the next assizes.

The application to extend the injunction to stay trial is always successful, unless opposed by special circumstances, and the affidavit in support of the motion may be filed so late as the previous day: *Jones v. —*, 8 Ves. 46.

Sir SAMUEL ROMILLY, Mr. HART and Mr. WINGFIELD, against the motion.

After the delay practiced by the plaintiff the court will not afford the extraordinary aid solicited.

In July, 1817, notice was given for the production of these documents; the plaintiff, therefore, insisting on them as ma-

terial, must admit that he was at that time, at least (how much earlier appears not), apprised of their materiality, but he has since taken no means to obtain them; nor is it even proved that at the trial they were called for by his counsel. Can he now, on an application, within a few days of the assizes,¹ be permitted to postpone the second trial upon the sole ground of the want of this evidence?

The court would hesitate to grant that indulgence, even had the plaintiff recently obtained a knowledge of the existence of these papers; but after a delay of nearly two years must, without hesitation, refuse it.

It is not easy to understand how these documents can be material, at least the circumstances which they are stated to prove must, if true, be capable of other proof; and no necessity can arise for the admission of this evidence, in order to the attainment of the justice of the case.

The authority cited, *Jones v. ———*, 8 Ves. 46, refers only to the common affidavit, that the party believes the discovery to be material, and is not applicable to affidavits of special circumstances.

The LORD CHANCELLOR.

As I understand this case, in the year 1790 a grant was made of coal mines under different farms described in the deed, and among the rest, of mines under a farm described as in the occupation of the widow Kellett and son.

The question, what are the mines under lands so occupied? is a mere question of fact, and may undoubtedly be decided by evidence *dehors* the deed. It is said that before 1790, the widow Kellett and her son occupied the lands, to the minerals under which this contested claim is made, occupying them by virtue of one demise, and on payment of one entire rent; and that fact is alleged to be material to establish the right for which the plaintiff contends.

This at least is clear, that the grantees, whose agent the plaintiff is, had actually worked the mines on these premises from 1808 till 1816, when the action of trespass was commenced; and that that action, not commenced till then, was

¹ *Blacoe v. Wilkinson*, 13 Ves. 454.

not brought to trial till 1817. On the effect of these circumstances of time, it was for the jury to decide; but it has been very correctly stated at the bar, that if the defendants had filed a bill to stay the working of these mines, this court, now in the habit of granting injunctions in cases of trespass (see 19 Ves. 146, 147; *Grey v. The Duke of Northumberland*, 17 Ves. 281, and cases there cited; *Stevens v. Beekman*, 1 Johns. Ch. R. 318) as well as of waste, must have refused an injunction to parties who had permitted these operations to proceed from 1808 till 1816, without interruption. To stop the working of a coal mine is a serious injury; and the expenditure incurred in the course of eight years, would raise an equitable ground to prevent the hasty interference of the court. The defendants would have been directed first to bring an action, and to return when the result of the trial had enabled the court better to deal with the application. In 1817 they proceed to trial; and clear as it is that this discovery is extremely material, the plaintiff, instead of adopting from the beginning the usual mode of compelling a discovery here, gives notice to the plaintiffs at law to produce the rent rolls and other documents, but the construction of the affidavits, though critically correct, is strained, by which they are understood as amounting to a statement that the production was not required at the trial. It is true that the fact might probably be established to a certain extent by the evidence of witnesses, for many persons must be still living who knew the nature of the occupation of these premises; and yet it may be equally true that no other explanation or testimony would be as satisfactory as the evidence in the possession of the landlord. No bill for a discovery, however, was filed, and while it must have been known that the notice to produce the documents was nugatory, in the event of non-production at the trial, unless the plaintiff was prepared with parol evidence of their contents, no attempt was made to give such evidence, nor did the plaintiff obtain a *subpœna duces tecum*, which, according to the present determinations at law, it would not be discreet to disobey; for though the party may in court object to produce the documents, yet, if the objection is overruled, the court will compel the production. (As to the effect of negligence in such cases, see *Smith v. Lowry*, 1 Johns.

Ch. R. 320; *Barker v. Elkins*, Id. 465; *Dodge v. Strong*, 2 Id. 228. And particularly *McVickar v. Wolcott*, 4 Johns. 510. But see also *Spencer v. Wilson*, 4 Mun. R. 130, which looks the other way. And *Preston v. Gressom's Distributees*, Id. 110, is another exception to the general rule.)

If the defendants had come to this court immediately after the trial, stating that the impediment which previously existed was removed by the verdict they had obtained, and praying an injunction against repeated trespass, it may be worth their consideration, whether if it had been satisfactorily established that they would not at the trial make a production necessary to the fairness of the decision, this court would have granted an injunction. It is another question what I am to do with the present bill. On the motion for a new trial, I can not think that the Court of King's Bench would be influenced by the production or non-production of the documents; they would have said only that other measures should have been adopted to enforce production, but on the ground that the judge rejected evidence which he ought to have received and laid before the jury, that court granted a new trial. Now, without referring to the case in the Exchequer, *Whitmore v. Thornton*, 3 Price, 231, I entertain no doubt that after the trial, with proper and apt charges, a bill might have been filed in this court to compel the production of these documents, to which a demurrer would not have been allowed. That proposition in no degree impeaches the judgment of the Court of Exchequer, that a bill stating only that a verdict has passed against the plaintiff, and praying a discovery without imputing a violation of the duties arising from the relation between the parties could not be sustained. I do not mean to dispute that doctrine, but considering the mutual obligations of landlord and tenant this is a different case, and a bill might have been sustained in this court for relief and for discovery.

Then it is said that pending the application for a new trial no one could have advised the defendant at law to file a bill. Now, in my opinion, the attempt to obtain a new trial, after being foiled in compelling the production of these documents which he believed to be necessary evidence, was a reason for filing a bill; and I think there was negligence in this respect, though I am far from imputing blame to any one. The Court

of King's Bench, from the state of their business, did not give judgment on the motion for a new trial till the 21st of January, and during all that time no bill for a discovery was filed.

Having obtained the judgment of that court the defendant at law then files the bill, and within a few days of the trial makes this application. My opinion is that the vice-chancellor was right. In strictness, I can not stay the trial because the defendants withhold this evidence, but it will be for them to consider whether, should they, refusing the production, obtain another verdict, and then apply here for an injunction against future trespasses, it may not be a subject of discussion in this court, what is to be the effect of a verdict in a mere action of trespass on an equitable right, after such length of possession.

Motion refused with costs, the defendants undertaking to produce the documents on oath at the trial.

CAPNER V. THE PRESIDENT AND DIRECTORS OF THE FLEMINGTON MINING CO.

(3 New Jersey Equity, 467. Court of Chancery, 1836.)

¹ **Waste on mortgaged mine.** Capner sold his farm to a mining company by articles in which the payment of certain installments of purchase money was secured by a clause to the effect that he should have all the remedies of a mortgagee. In other clauses the fact of the sale being for mining purposes appeared. The vendor sued to foreclose, and prayed for an injunction to stay waste, and on appeal it was *held*, that the injunction should have been refused so far as it affected the cutting of necessary timber and the digging of shafts, etc., for mining purposes, such acts not being waste, but was proper to prevent the removal of buildings and fences, etc., done to injure and harass the complainant.

Jurat omitted by mistake. If an injunction bill has been actually sworn to, the injunction will not be dismissed because the master has omitted to sign the jurat.

² **Notice of application—³ Discretion.** The operations of large mining companies should not be arrested by injunction without notice, except in

¹ *Irwin v. Davidson*, 7 M. R. 237.

² *Golden Gate Co. v. Superior Court*, 2 West C. R. 736; *Perkins v. Collins*, 3 N. J. Eq. 482.

³ *Hiller v. Collins*, 63 Cal. 235.

very plain cases, or where there is a pressing necessity for immediate action. There is a discretion which the court must exercise in every case. **Mortgagor may continue mining.** A charge of waste, whereby the mortgage security is diminished, is always a sufficient ground for an injunction as between mortgagor and mortgagee; but when the property was purchased and is occupied for mining purposes, use of the property in mining operations can not be considered waste.

Bill by a mortgagee against the mortgagors, to restrain the commission of waste. On filing the bill an injunction was issued by order of a master, made *ex parte*, and without notice to the defendants. The defendants, before answer, moved to dissolve the injunction as irregular. The cause was heard on the motion to dissolve.

SAXTON, for defendants in support of the motion.

WURTS, contra.

Chancellor VROOM.

In eighteen hundred and thirty-four, Capner sold his farm to the Mining Company for forty thousand dollars, payable in installments. Thirteen thousand five hundred dollars of this has been paid, in money and stock. An installment of eight thousand five hundred dollars fell due on the first of March, eighteen hundred and thirty-six, on the payment of which, and securing the balance by bond and mortgage on the premises, full possession of the whole property was to be delivered to the company. Previous to this, Capner was to have the use of the farm for agricultural purposes, while the company were at liberty to carry on their mining operations, open shafts and dig for ore, etc., as they might find advantageous. It was stipulated in the agreement between the parties that in case the payment of eight thousand five hundred dollars, due on the first of March last, should not be made, that Capner, besides other remedies against the company, should, by reason of the default, have all the remedies of a mortgagee against a mortgagor, in this State, for the mortgaged premises, upon non-payment according to the conditions of the mortgage, so far as they can be applied to enforce the payment thereof. The payment not being made, Capner filed a bill to foreclose all the rights and equities of the com-

pany, and for possession, and also for an injunction to prevent the commission of waste. The injunction was ordered by a master, *ex parte*, and it is now moved to set it aside as irregular on several grounds.

1. The first is, that the bill was not properly verified.

The affidavit was drawn out at the foot of the bill in the usual way, and signed by the complainant, but the jurat was not signed by the master. Such an omission should not vitiate the injunction if the bill was actually sworn to, as was the fact. It was an omission of the court, but one which could not affect the interests of the defendants. Perjury could have been assigned upon the affidavit if the facts were untrue.

2. The injunction, it is contended, was granted without notice, and therefore irregular.

There is no general rule on this subject, but the operations of large companies should not be suddenly stopped without an opportunity of being heard; and it has been usual for the court to cause notice to be given, except in very plain cases, or where there was a pressing necessity for immediate action. There is a discretion which the court must exercise in every case. If the operation of this injunction had been entirely to prevent the company from working their mines, I should have been inclined to set it aside, on the ground that there was not a case of pressing necessity, and that the defendants were entitled to notice. But the injunction does not go that length. It does not prevent the defendants from working in the shafts already opened, and can not, therefore, be accompanied by any lasting or wide spread injury, though it may occasion temporary embarrassment or inconvenience. I do not think proper to disturb the injunction on this ground.

3. It is contended that there is no equity in the bill to sustain the injunction.

There is waste charged, so as to diminish the complainant's security, and that is always a sufficient ground for an injunction as between mortgagor and mortgagee. I am of opinion, however, that there has been a misapprehension as to what constitutes waste under the facts of this case, and the peculiar situation of these parties.

The property was purchased and is occupied for mining purposes. This is evident from the price to be given, and all the

covenants. So far as is necessary or proper for these purposes, the company are in possession by permission not only, but of right, and any use of the property in mining operations can not be considered as waste. It is not charged that they are using it ignorantly, or in such way as intentionally to injure the complainant without any benefit to themselves; nor is it pretended that the mines are wholly unproductive, or that the property is really valueless, except for agricultural purposes, and that therefore, if the company is permitted to go on *ad libitum*, excavating and searching for ore, that the property will be entirely lost to the complainant as a farm; the injunction does not rest on either of these grounds, and I am at a loss to conceive how the company can commit waste and spoil by using the property in the mode agreed on by the contract. Suppose the eight thousand five hundred dollars had been paid in March, and Capner had taken a mortgage for the balance of the purchase money, and it was not paid at the time stipulated, he might have filed a bill to foreclose the equity of redemption, but he could not have prevented the company from using the property in their mining operations. Coming in here at this time as a mortgagee, he has no better rights.

The case of *Den v. Kinney*, 2 South. 552, is analogous to the present. The lessor of the plaintiff had covenanted to convey to the defendant a furnace property and put him in possession. The purchase money not being paid an ejectment was brought and an application was made for a rule against the defendant to stay waste. It appeared that several hundred cords of wood had been cut, but the court said that as the use of the wood was for the common purposes of the estate it was not waste; that the land being annexed to a furnace it was only using it in the ordinary mode; and the rule was refused.

I am of opinion that in this case the injunction should be modified; that so far as it restrains the company from opening new shafts and digging for metals or minerals at any other point or place than where they were engaged at the time of filing the bill, and spreading over the premises the earth excavated, and removing or carrying away from the premises any ores, minerals or metals, it should be set aside. So far as it restrains the company from moving or carrying away

any fixtures, buildings, fences, or other erections, it should be retained. The other part of the injunction, which prohibits the defendants from cutting down or injuring any timber or trees, or pulling down any fences, or interfering with and disturbing the complainant and his agents while engaged in their lawful avocations and business in and about the said premises, and obstructing their peaceable ingress and egress to and from thence, must be so modified as to apply only to acts out of the ordinary course of the lawful business of the company, and done for the purpose of harassing and injuring the complainant.

Let the injunction be modified so as to conform with these directions.

BRACKEN ET AL. V. PRESTON ET AL.

(1 Pinney, 584. Supreme Court of Wisconsin, 1845.)

Equity jurisdiction to restrain trespass. An injunction will be granted to restrain a trespass in order to quiet the possession, or when there is danger of irreparable mischief, or where the value of the inheritance is put in jeopardy by a continuance of the mischief, but in ordinary trespasses, or where the remedy at law is adequate, equity refuses to interfere.

Trespass in digging or mining on the land of another is within the cognizance of a court of equity when committed by a mere wrong-doer, or where a party exceeds a limited authority.

¹Surrender of possession not decreed. To justify the interference of equity, the complainant must in general be in possession or have established his right at law, or brought an action to recover possession, or his exclusive right must be admitted by defendant; but the court will, in all such cases, proceed with great caution, and although a defendant does not show a legal right to possession, yet as a court of equity has no direct jurisdiction to try title, except in certain peculiar cases, it will not decree that the defendant surrender possession.

Disseized plaintiff. No injunction will be allowed in cases of trespass with an account, where the complainants, being disseized, can not maintain an action for mesne profits.

Measure of damages in trespass by plaintiff out of possession. A person disseized of a mine can not maintain trespass except for the entry and ouster in which case damages would be restricted to the entry and ouster; but damages for a continuance of a trespass can be recovered only after the party disseized has regained possession.

¹ *Brennan v. Gaston*, 7 M. R. 426.

¹ **Account of ore dug—Possession.** Where a bill prays an account of ore dug on complainant's lands, a court of equity will decree it in a proper case, but the complainant must show that he is in possession.

Requisites of bill—Insufficient case for interlocutory writ. Where a bill was brought alleging a continuing trespass by mining copper ore, showing that complainants had been disseized, and praying an injunction pending an action for forcible entry and detainer, and for an account of mineral exsented, and for decree that defendants surrender possession and the complainants be quieted in their title; and it appeared that the defendants were in possession under claim of right; *Held*, that the bill did not state a case entitling them to relief; that ejectment was the proper remedy with a preliminary injunction on a proper bill showing the pendency of such action to try title, and that after recovery therein the plaintiffs could obtain satisfaction by an action for mesne profits.

² **Ejectment maintainable on receiver's receipt.** In actions between individuals the receipt of the receiver of a land office is, under the statute, sufficient legal evidence of title, though as between the holder of it and the government, the legal title still remains in the United States.

Appeal from the District Court of Milwaukee County.

The complainants, Charles Bracken, David Irvin, Amelia Daniels, Sarah Daniels and Cecilia Daniels, filed their bill in the District Court for Iowa County against Sylvester B. Preston, William Kendall, William T. Phillips and William Nichols, claiming to be the owners of a certain tract of land in Iowa county, and praying for a decree for an account of mineral taken therefrom by the defendants, and that they be decreed to yield and surrender possession thereof to the complainants, and for an injunction to restrain the defendants from working a copper mine on the premises in question. After the bill had been answered the venue was changed to Milwaukee county, and at the hearing the District Court of Milwaukee county made a decree dismissing the bill, from which Bracken appealed. The allegations of the bill and the substance of the answer and evidence are stated in the opinion of the court.

T. P. BURNETT, for appellant.

F. J. DUNN, for appellees.

¹ *Sayer v. Pierce*, 1 M. R. 72.

² *Jackson v. McMurray*, 4 Colo. 76; *Post PLEADING*.

MILLER, J.

The bill of complainants is sworn to by Charles Bracken, one of complainants, who is also next friend of Sarah Daniels and Cecilia Daniels, of Michigan, minor children of Lyman J. Daniels, deceased. Amelia Daniels is the widow of said Lyman, deceased. The bill sets forth that on the 18th day of November, A. D. 1835, Charles Bracken, David Irvin and Lyman J. Daniels entered at the land office at Mineral Point, in Iowa county, the east half of the northeast quarter of section No. 5, in township No. 4, of range No. 3, east, containing $80\frac{2}{100}$ acres, and the receiver's receipt for the payment of the purchase money, of the same date, is presented as evidence, by which the parties became seized as tenants in common of the said land, and as such have the absolute, sole and exclusive right to the use, occupancy and possession of the said tract of land, and to all the rents, issues and profits of the same; and to all minerals, ore and mineral dirt, of whatever description or kind, that were, or might at any time be or exist in or upon said tract of land; that a very valuable mine of copper ore was discovered upon said land, which said mine has been extensively worked, and a large quantity of copper ore, and of dirt intermixed with copper ore, has been raised to the surface of the ground from such mine. And after said copper mine had been discovered and worked, and after large quantities of copper ore had been raised as aforesaid, William Kendall, Sylvester B. Preston, William T. Phillips and William Nichols, without law or right, and contrary to the will of complainants, entered and took possession of said tract, on or about the 25th day of June, 1842, and continued therein until the 20th day of July, A. D. 1842, and refused to permit complainants to take possession of, or in any manner to occupy or enjoy that portion of the said tract embracing said copper mine, and during all that time took and carried away from the said tract of land large quantities of copper ore, and during all that time converted to their own use the whole of the products of the said copper mine. And that on the said 20th of July, 1842, the said Charles Bracken, having quietly and peaceably taken possession of the said tract of land and copper mine, and having left his agent in possession of the same, who was quietly and peaceably hold-

ing the same by the authority of the said Charles Bracker, and for his use and benefit, the defendants, with force and arms, and with strong hand, unlawfully and forcibly did again enter upon said land and expel the said agent therefrom, and again took possession of the same, and refused to permit complainants to enter upon the same and occupy said copper mines, or take the copper ore, but have converted and are converting the same to their own use, and retain the possession thereof.

On the 2d of August, 1842, Charles Bracken made his complaint against the said defendants for forcible entry and detainer upon and of said premises, to a justice of the peace of Iowa county, and a summons was issued returnable on the ninth of the same month; but complainants justly fear that before the return day of said summons the said defendants will commit great and irreparable waste upon said premises by removing the said copper ore from said premises, and that they are continually removing the same and threaten to supersede by certiorari any writ of restitution complainants may obtain in pursuance of said proceeding in forcible entry and detainer. And complainants greatly fear that defendants will commit great and irreparable waste upon said tract of land before they or either of them can obtain any adequate or permanent relief at law, and pray that defendants may be decreed to surrender up to complainants the quiet and peaceable possession of the said tract of land and copper mine of which they are seized as aforesaid, and all the proceeds of the same; and that defendants may render an account of the proceeds of said copper mine, and how much of the same they have disposed of and converted to their own use; and be decreed to pay the same to complainants; and that the complainants may be quieted in their title to and possession of said premises; and for such other relief as the nature and circumstances of the case may require.

The defendants' answer was filed in the court of Iowa county on the 4th of February, 1843. They admit that the land aforesaid was entered by Bracken, Irvin and Daniels as set forth in the bill, but deny that said entry vested in them the fee of said lands, but that as no patent therefor had been issued, the fee remained in the United States; admit that Bracken, Irvin and Daniels and the said widow and heirs of

said Daniels may have been seized and possessed as set forth in said bill, but aver that they always understood that Arthur Brunson, of New York, to whose agent defendants paid rent, was the owner of the interest of said Daniels; and defendants deny that the complainants had sole and exclusive right thereto during all the time to the filing of the bill, nor had they the sole right to all the mineral ore on said land, or to mine and dig on the same, but the right of complainants to the sole occupancy of said premises was restricted by their leasing and letting the said premises to many persons to mine and dig upon. The defendants admit there was a valuable discovery of copper ore made on a part of said tract, but deny that it was made when the complainants were in possession, or had the right of possession to that part of said tract on which said discovery was made. From the time of the entry of said premises until after said discovery was made, by common custom, and by tacit consent of the owners of said tract, the same was at all times open to let and free to be taken up and worked in search of ore, by all and any persons who might choose to work the same, by paying the usual rent out of all ore raised on said premises. That Andrew Remphrey (under whom defendants claim) did, some time in the winter of 1841-42, ask of Charles Bracken, one of complainants, and who professed to be agent for the other owners, the privilege of mining, digging and searching for ore on said land, and that he gave said Remphrey leave to mine on said land, and to raise and take therefrom all ore he might discover, subject to the condition that Remphrey was to pay to the owners of said premises one fifth thereof, and said Bracken should have the privilege of having the remainder thereof if he would give as high a price and make as good payments as any other person for the same; said Remphrey at the same time applied to said Bracken for a written lease of said premises, but that he answered that a written lease was unnecessary as there were a sufficient number of witnesses present. Under said lease said Remphrey took as a partner one of the defendants, William T. Phillips, because he could not well work alone; and according to mining custom and rule, and after having made the valuable discovery of copper ore, went on said premises in company with Charles Bracken and measured

and staked off a lot 200 yards square, or thereabouts, according to the custom of the mines.

Some time after the first discovery was made, in March, 1842, the said Remphrey and Phillips made a very valuable discovery of copper ore on the said premises, at which time and frequently thereafter the said Bracken was on the said lot, and appeared to be well satisfied with the manner of working the said ground and the discoveries that had been there made, and the right of the said Remphrey and Phillips to the said ores, except the one fifth rent as aforesaid. And also the other owners, or their agents, expressed entire satisfaction, after the discovery, of the letting aforesaid. And the said mine was peaceably and quietly worked for a long space of time, and large quantities of copper ore were raised from the same, and portions of it were removed to the most convenient water in order to cleanse and prepare the ore for smelting, which was absolutely necessary. After some time, and before any of the ore so raised was prepared for market, Bracken committed such acts of domineering as to indicate an intention to give trouble, when Remphrey sold to Sylvester B. Preston, one of the defendants, all his right, title and interest of, in and to the said lot so leased and laid off as aforesaid, and the copper ore discovery thereon, and the mineral then raised, for the sum of \$300, which he had a perfect right to do, his interest being the one half of the lot and discovery, the said William T. Phillips owning the other. The said Nichols and Kendall worked and were on the ground by permission of Preston and Phillips; and that from the said transfer by said Remphrey to Preston (which transfer was a matter that could not have been other than well known to said complainants, Bracken and Irvin) these defendants worked the said lot, and raised therefrom large quantities of copper ore. And after some was washed and prepared for market, they caused notice to be given said Bracken by the agent of David Irvin, one of complainants, that the said ore that was so raised by said Phillips, Remphrey and these defendants, amounting to about 50,000 pounds, was ready for sampling, division and market, and offered at the same time to let said Bracken have four fifths of said mineral owned by said defendants at \$16 per thousand, or to give for the other fifth (the rent mineral) the

same sum per thousand, when said Bracken urged no objection whatever to these defendants occupying said lot and digging and raising ore, but urged as a reason why he would not give or take \$16 per thousand, that he wished some permanent price set on said copper ore that would govern all ore raised on said lot; that these defendants were compelled to be governed by the price of copper and copper ore in the market to regulate the price they could pay for copper ore. Said Bracken was also notified that the ore owned by the defendants was ready for market, but he would not give as good prices for the same, or make as good payments as others would. He offered no price whatever at any time for the ore, nor did or would he offer at the time of the division of the said ore, but the clerk of Curtis Beech, who was, as defendants understood, the agent of two of the owners of said premises, and as such agent, controlling two thirds of the rent, attended said division, and there was then and previous to the exhibiting of the bill of complaint at all times a fair division of all ore ready for market that was raised on said lot, which division was acquiesced in by said agent. Defendants continued to occupy and work the mine and raise ore for some short time after the aforesaid division, and to remove the said ore to the wash place to prepare the same for division and market, in hopes that they would be permitted, peaceably and quietly, to mine and occupy said lot so long as they complied with the terms of letting the same with the privileges of mining to said Remphrey, which these defendants state that they at all times complied with. The said Charles Bracken, without right or color of right, on the morning of the 20th of July, 1842, or early in the morning, with his brother John Bracken and Lott Harris, went to the said mine, and when some of these defendants and their laborers went as usual to said lot or mine, they found the said Charles Bracken, John Bracken and Lott Harris had drawn the mining tools of the defendants out of the shaft in which the defendants had been at work and moved them some distance from the shaft. Charles Bracken then said to defendants that he had taken possession of the ground in his own right, and intended keeping possession, and then removed the windlass of defendants from the shaft, and placed another windlass there belonging

to himself or some other person. Bracken claimed the possession by his own right as owner of the soil. After some verbal altercation said Charles Bracken, John Bracken and Lott Harris left the ground, and defendants continued in possession to work as usual.

The defendants attended upon the justice in the forcible entry and detainer case, which plaintiffs discontinued, and immediately commenced a second prosecution, which was tried and a verdict rendered for the defendants; the complainant thereupon issued a writ of certiorari to remove the proceedings to the District Court of Iowa county where the same was pending. After the trial of this case, the defendants removed a large quantity of ore which they had raised to the wash place, and notified said Bracken and the agent of the owners, that the same was ready for division and market, which was taken by said Bracken and complainants by a writ of replevin.

The defendants say that those of them who own the said lot and discovery and who were not on the said lot and premises when the said discovery was first made, came into possession by purchase for a valuable consideration, and that they all claim under Andrew Remphrey, who leased in good faith from the said Charles Bracken, and had a right by common custom to dig on such ground without such express consent; that they purchased in good faith and have strictly complied with the terms of the letting to said Remphrey. Have never been in possession of any part of said premises set forth in the bill, except the said lot and discovery; and that they have a right to the possession of said lot as long as they comply with the terms of the lease aforesaid, and faithfully work said lot as they have always done. And they deny that the said Charles Bracken was at any time after the said copper discovery in the quiet and peaceable possession of the said lot and discovery thereon, or that he was ever forcibly expelled therefrom, but that defendants and Andrew Remphrey, under whom they claim, have been in the possession of said lot and discovery from the time the said lot was taken up and discovery made to the present time; and if that possession has not been peaceable it was owing to the unlawful and dishonest acts of one of the complainants; and that Bracken always had the option of purchasing the said ore, on due notice. Nor did they ever threaten to remove the judgment in the case of forcible entry

and detainer by certiorari, for they did not suppose a judgment would ever be rendered against them.

Bracken, in his petition to the court of Iowa county respecting the injunction, represents, that being the owner in fee of the equal, undivided one third part of the said tract of land, and having the agency and charge of the other two thirds, which were owned in fee by said Irvin and Daniels' heirs, he gave to Andrew Remphrey verbal permission to dig, etc.

Andrew Remphrey states in his deposition that he asked Charles Bracken if the piece of land he wanted was the piece which William Henry was promised, and he said no. Then asked Bracken if he could have it, and he said yes. Witness asked him the terms, and he said he would let it for one fifth and give him the privilege of the copper; then witness said provided you give as much as any other person, and the only word he made in reply was, certainly. About the limits of the land we did not finally agree then, but Bracken promised to meet witness on the ground. About four or five weeks after, Bracken met witness on the ground; they hauled witness up out of the shaft, and he said, Andy, what way do you want your limits; witness replied 200 yards east from that stump, 100 yards north therefrom, 100 yards south. Bracken notified witness not to assign this lease or privilege. Witness assigned it to Preston in writing before suits were commenced.

Richard Crocker states in his deposition about the same in substance as contained in Remphrey's deposition respecting the contract. Curtis Beech also states the same in substance. It appears in evidence, that Bracken and defendants are smelters at different establishments. And in June, 1842, Preston, one of the defendants, said he was willing to give \$16 per thousand for the one fifth of the ore then on hand, or take the same for the four fifths, of which Bracken was informed. It also appears that they waited for Bracken's decision in the matter, whether he would give or take on this proposal. It also appears in proof that Bracken entered upon the ground in July, 1842, in company with others, when he made a claim of possession and notified the defendants to quit; and that the defendants continued in the uninterrupted possession. In June or July, 1842, David Irvin authorized Curtis Beech to act as his agent and to receive his dues, and that he did so for a

short time, and sent a hand to see the ore divided, by putting one fifth in one pile and four fifths in another; and that before the commencement of suits the ore was raised in great quantities and regularly divided.

The bill presents a case of trespass with a *continuando*, and prays for a preliminary injunction to prevent the defendants from committing irreparable injury to the premises during the pendency of a prosecution for forcible entry and detainer. It also prays for a final decree for surrender of the premises; for an account, and that the complainants may be quieted in their title and possession. The defendants allege and prove that they are in possession of the mine, claiming the right. What right the defendants have to the possession it is not necessary in this case to determine; whether there is a lease or a license between the parties, or whether it was a mere contract for personal service on the land of the complainants, we will not stop to consider.

From an examination of the authorities upon the subject it appears that an injunction lies to restrain a trespass in order to quiet the possession; or where there is danger of irreparable mischief, or where the value of the inheritance is put in jeopardy by a continuance of the trespass. The foundation of this jurisdiction in equity is the probability of irreparable mischief, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits. In ordinary trespasses, or where the courts of law can afford complete satisfaction, equity refuses to interfere, and will rarely and under very peculiar circumstances entertain jurisdiction in actions of tort: *Yancy v. Downer*, 5 Litt. 9; *Stevens v. Beekman*, 1 Johns. Ch. 319; *Livingston v. Livingston*, 6 Id. 497; *Jerome v. Ross*, 7 Id. 315; *New York Printing Est. v. Fitch*, 1 Paige, 97; 6 Vesey, 147; 7 Id. 305; 8 Id. 89; 10 Id. 290; 17 Id. 128-281; 18 Id. 180; Eden on Inj. 136, 137, 138, 139; Fonblanque's Equity, 3 and notes; 31 and notes; 50 and notes; Story's Eq. 209. And this power of equity, when exercised, is by means of injunction.

Trespass in digging mineral or mining on the land of another comes within the cognizance of a court of equity when committed by a mere trespasser, or where a party exceeds the limited rights with which he is clothed.

Every bill must contain within itself sufficient matter of

fact, *per se*, to maintain the case of the plaintiff, and the proof must be according to the allegations of the parties: *Harrison v. Nixon*, 9 Pet. 483. The plaintiffs in this case acknowledge themselves out of possession. The bill sets forth "that after the copper mine had been discovered and worked, and after large quantities of copper ore had been raised, the defendants, without law or right, and contrary to the will of complainants, entered and took possession of said tract on or about the 25th day of June, 1845, and continued therein until the 20th of July of the same year, and refused to permit the complainants to take the possession of, or in any manner occupy or enjoy that portion of said tract embracing said copper mine; and during all that time took and carried away large quantities of copper ore; and during all that time converted to their own use the whole of the products of said copper mine; and that on the 20th of July, 1842, the said Charles Bracken having quietly and peaceably taken possession of said tract of land and copper mine, and having left his agent in possession of the same, who was quietly and peaceably holding the same by authority of said Bracken, and for his use and benefit, the defendants, with force and arms and with strong hand, unlawfully and forcibly did again enter upon said land and expel the said agent therefrom, and again took possession of the same, and refused to permit complainants to enter upon the same and occupy said copper mine or take the copper ore, but have converted and are converting the same to their own use and retain the possession thereof."

The policy of preventing irreparable injury has introduced an exception to the general rule in cases of waste, or of mischief analogous to waste, but this does not extend to questions of title: 1 Smith's Ch. 595; *Morpheitt v. Jones*, 19 Vesey, 350. The complainants, in cases of waste, must generally have the possession of the premises, or have established their right at law, or have brought an action to recover the possession, or in cases of tenants, after notice to quit: 1 Smith's Ch. Pr. 593; 3 Barb. & Harrington's Dig. 478, 479; *Scott v. Wharton*, 2 Hen. & Munf. 25; *Duvall v. Waters*, 1 Bland, 576; 2 Story's Eq. 177, 207; *Hart v. The Mayor of Albany*, 3 Paige, 213. In such cases courts are generally

cautious, and they will not grant relief when the complainant is out of possession. In cases of this nature courts make a great difference between restraining a defendant from working a mine already opened, and restraining him from opening one: *Grey v. Duke of Northumberland*, 13 Vesey, 236. And it is held in many cases referred to on pages 51 and 52 of Fonblanque's Equity, that the plaintiff's exclusive right must be admitted by the defendant or established at law, to warrant the interference of a court of chancery.

No injunction will be allowed in cases of trespass, with an account, where the plaintiffs can not maintain an action at law for mesne profits. In 6 Bacon's Abr., title Trespass, page 566, it is stated that "only the person who has the possession, in fact, of real property to which an injury has been done, can maintain an action of trespass, *quare clausum fregit*; a general property not being in the case of real property, as it is in the case of personal, sufficient to found this action upon." Also in *Meghan v. Mills*, 9 Johns. 64; *Coryfield v. Coryell*, 4 Wash. C. C. 371. After entry the owner may have trespass *quare clausum fregit*, but not before: 17 Pick. 263; 17 Mass. 282. A person disseized can not maintain trespass: 10 Pick. 171. Trespass would probably lie for the entry and ouster of the plaintiff, but damages can only be recovered for the simple entry and ouster, and not for the continuance of the trespass. Damages for the continuance are not recoverable until after plaintiffs have gained possession: *Holmes v. Seely*, 19 Wend. 507; *Mather v. The Trinity Church*, 3 Serg. & Rawle, 509; *Brown v. Caldwell*, 10 Id. 114; *Demott v. Hagerman*, 8 Cow. 220; 6 Serg. & Rawle, 476.

When a bill seeks an account of ore dug, the court of chancery will decree it in a proper case: *Bishop of Winchester v. Knight*, 1 P. Wms. 406; because the working of a mine is a kind of trade: *Story v. Lord Windsor*, 2 Atkyns, 630; *Marquis of Lansdowne v. Marchioness of Lansdowne*, 1 Mad. 73; but the plaintiff must show his possession: *Lyn v. Pierce*, 5 Vesey, 259. "Neither will equity, in all cases, decree an account of mesne profits; for where a man has title to the possession of lands, and makes an entry, whereby he becomes entitled to damages at law for the time that possession was

detained from him, he shall not, after his entry, turn that action at law into a suit in equity, and bring a bill for an account of the profits, except in the case of an infant, or some other very particular circumstances, which extend to all those cases that involve an equity which can not be made available at law." Fonbl. Eq. 31, 32.

Although the defendants have not shown a legal right to the possession, we can not decree a surrender, for it is not the practice of this court to determine the legal rights of the parties, and make such a decree. A court of chancery does not possess any direct jurisdiction over legal titles. The court may perhaps try titles to lands, when they arise incidentally; but it is understood not to be within its province. The power is only to be exercised in difficult and complicated cases, affording peculiar grounds for equitable interference: *Abbott v. Allen*, 2 Johns. Ch. 524. If the case be clear, a court of equity will interfere to quiet the title to land: *Alexander v. Pendleton*, 8 Cranch, 462; but the plaintiffs must be in possession of the land; the injunction to yield up or quit possession of land is a judicial writ, and subsequent to a decree in the nature of a writ of execution. It is sometimes used in aid of a judgment at law. It is always issued in aid of a decree in chancery, in putting a purchaser into possession, and is followed by a writ of assistance: *Eden on Inj.* 261; *Story's Eq.* 226, 227; *Kershaw v. Thompson*, 4 Johns. Ch. 609. This injunction is never granted in a case like the one now under consideration.

So if a bill should be brought for the possession of land, which is commonly called an ejectment bill, it would be demurrable, for the proper redress is at law. And even if such bill should charge that the defendant had gotten the title deeds and mixed the boundaries, and should on that ground pray for a discovery, possession and account, a demurrer (at least upon the doctrine maintained in England) would lie. For, although the plaintiff would be entitled to the discovery of the title deeds, yet he would not have any title to the relief; that after the discovery being properly given, it is at law; and by praying relief as well as discovery, his whole bill would be demurrable: *Story's Eq. Pl.* 374, 375, and cases there cited.

The court is not willing to exercise the chancery jurisdic-

tion, unless in clear cases properly presented, and in which it satisfactorily appears that full and complete justice can not be had at law. In this case it appears that Bracken, one of the complainants, assumed to act for himself and the other complainants, in letting the mine and making the contract with Remphrey for working it. The other complainants did not dispute Bracken's authority to act in the premises. They desired the mine to be worked for their own interest, and put Remphrey into possession, who transferred his possession to these defendants who continued to work the mine as Remphrey had worked it. Now it can not be made satisfactorily to appear that this is a case of such irreparable injury as would entitle the complainants to the aid of this court on this bill. The defendants allege and prove that they are in the actual, exclusive and adverse possession of the mine, claiming the right. It fully appears that Charles Bracken made an ineffectual effort to regain the possession. Hence it is apparent that this presents a case wherein full and complete justice can be done in an action at law. Ejectment is the proper remedy, with a preliminary or interlocutory injunction to stay waste, upon a proper bill, during the pendency of the action; and after the recovery, an action of trespass for the mesne profits. But it is contended that inasmuch as the complainants are not invested with the legal title to the premises by a patent from the United States, an action of ejectment can not be maintained. The patent is not an indispensable muniment of title for this purpose. The act making receivers' receipts evidence will enable the plaintiffs to recover possession of the land in ejectment. Between individuals the receiver's receipt, under this statute, is recognized as legal evidence of title, but not against the United States: *Wilcox v. Jackson*, 13 Pet. 516.

It is therefore considered and adjudged by the court that the decree of the District Court of Milwaukee county, dismissing complainants' bill, be and the same is hereby affirmed with costs.

Judge IRVIN was a party to this action and did not participate in the hearing or decision.

Affirmed.

MOORE V. FERRELL ET AL.

(1 Georgia, 7. Supreme Court, 1846.)

¹ **Notice to dissolve.** Service of the rule *nisi* upon complainant's solicitor, stating the grounds of the application and fixing the time and place of hearing the motion to dissolve an injunction in vacation on the coming in of the answer, is sufficient service.

What answer will compel dissolution. Where the answer plainly and distinctly denies the facts and circumstances upon which the equity of the bill is based the injunction will be dissolved; but where the trespass itself is not denied and the defense is in the nature of confession and avoidance there is not a denial of the equities.

² **Irreparable nature of injury.** The irreparable character of the injury is a necessary legal inference from the facts admitted—that defendants are taking the gold.

Title and insolvency denied. Trespass will be enjoined in all cases where from the nature of the trespass or the circumstances of the parties the remedy at law is not adequate, but equity will not intermeddle with the title; where title is denied courts will look more closely to the character of the trespass. It will not dissolve an injunction against gold mining upon an answer denying only the title and the allegation of insolvency.

For the facts of the case see the opinion of the court.

UNDERWOOD & TRIPPE, for plaintiff in error.

AKIN, for defendants.

By the Court, NISBET, J.

This cause came before this court upon a transcript of the record, from the county of Gilmer. The plaintiff in error, Michael C. Moore, filed his bill in the court below, alleging that, as a fortunate drawer in the land lottery, he is the rightful owner of a lot of land situate in the county of Gilmer; that there is on it a rich, and therefore valuable gold mine; that the defendants, Ferrell and others, being in possession, are engaged in digging gold from the mine, and are daily carrying away large quantities of gold; that they are either insolvent, or so poor as to be unable to respond in damages;

¹ *Capner v. Flemington Co.*, 7 M. R. 283.

² *Anderson v. Harrey*, 7 M. R. 291.

that it is impossible to prove the amount of injury which they are likely to do to the complainant, without resort to their consciences; and that the trespass of the defendants will result in irreparable injury to him unless they are restrained.

The bill concludes with a prayer for injunction, that the title papers of the defendants be delivered up to be canceled, and for relief generally.

The bill was sanctioned and the injunction ordered. Before the appearance term of the bill, the defendants filed their answer and moved the court at chambers for a rule upon the complainant to show cause why the injunction should not be dissolved. The rule being granted, service thereof was perfected, upon the complainant's solicitor. The answer admits that the complainant was the drawer of a lot of land under the Lottery Acts of the State of Georgia, and that the State's grant had duly issued to him; but states that since the issuing of the grant, the land has been sold as the property of the complainant by the sheriff of Gilmer county, by virtue of an execution against the complainant, issued from a magistrate's court; and that they claim title under the purchaser at the sheriff's sale.

The defendants, in their answer, further state that the complainant has parted with all the title which he ever had to the land by deed to one Samuel Tate. They admit that they are in possession and engaged with a large force in digging gold; that the mine on the land is valuable; and that they receive from it daily a considerable amount of gold. Their insolvency they neither admit nor wholly deny. Such are the facts embraced in the bill and answer, which the court think necessary to be stated, in order to a clear understanding of the principles of law, which they believe govern this cause.

The judge of the circuit court having heard argument at chambers, upon the rule dissolved the injunction.

To this decision the complainant excepted, and assigned for error:

1st. That the injunction was dissolved before the term of the court to which the bill was returnable, contrary to the statute of Georgia.

2d. That the rule to show cause was not legally served, it being served on the complainant's solicitor, when it should have been served on the complainant himself.

3d. That the bill being filed to restrain a trespass upon a gold mine, and the matter set forth therein, showing a case of irreparable injury to the complainant, and of utter destruction to the mine, a court of chancery will enjoin the trespass until the title to the land can be settled by judgment of a court of law.

Two other assignments of error were made, but are considered only as different forms of the third assignment. Issue being joined, the cause was ably argued upon the second and third assignments, the first being abandoned by the counsel for the plaintiff in error.

In the 4th of our rules in equity it is provided that in cases of injunction, the respondent shall be entitled to file his answer at any time after the filing of the bill, and thereupon, at chambers, moving the judge who granted the bill for the dissolution of the injunction: if the equity of the bill shall be sworn off by the answer. But in such cases a rule *nisi* stating the grounds of the application and fixing the time and place of hearing the motion, shall be served on the *complainant* at least ten days before the hearing of any such motion. The service of the rule *nisi* in this case was made on the complainant's solicitor, instead of the complainant, and for this reason it is contended, under the requirements of the rule recited above, that the court erred in not dismissing the rule *nisi* and holding up the injunction. This court does not so think. It is true that the 4th rule does require the service of the rule *nisi* to be on the complainant. The advantages of this requirement are more than counterbalanced by its inconveniences.

In most cases it would be more convenient and therefore desirable to the complainant himself, that the service should be upon his solicitor. It was intended, no doubt, as a boon, but it looks more like a burden to the complainant. Why it is so need not be here argued. Still if this was the only rule upon the subject of service of notices, the court would be constrained to reverse the decision of the circuit judge. By the 16th of our rules in equity it is provided as follows:

"After appearance by the party defendant to any bill in equity, by any solicitor of this court, the service of any subpoena to make better answer, or any rule or order of the

court on such defendant or solicitor, shall be sufficient; service on complainant or his solicitor shall in like manner be deemed sufficient service." The defendant having in this case filed his answer by his solicitor, the court holds that to be such an appearance by counsel as will bring the service of the rule *nisi* under the provisions of the 16th rule, and make it sufficient.

Waiving for a moment the main inquiry, and conceding that a court of chancery can enjoin a trespass, aside from any other consideration, was the equity of this bill so denied or sworn off by the answer as to entitle the defendants to a dissolution of the injunction? The court are of opinion that it was not.

It is a well settled rule in equity, that upon the coming in of an answer plainly and distinctly denying the facts and circumstances upon which the equity of the bill is based, the court will dissolve the injunction; it is also settled that for the purpose of the dissolution all such parts of the answer as are responsive to the bill are to be taken as true. What are the facts upon which the equity of this bill rests? The title of the complainant to the land, its great value in consequence of the gold ore imbedded in it, the insolvency, or inability to respond in damages, of the defendants, and the consequent irreparable injury they were doing to him by digging his gold. It is because of these facts, thus stated, that the injunction was at first granted, and if not denied, they constitute still the strongest equity.

Now so far from the answer denying them, they are all therein admitted, except the insolvency of the defendants, which it very unsatisfactorily denies. The answer admits that complainant drew the land, and that the State's grant was duly issued to him—that there is within it a rich mine which they (the defendants) are engaged in working, and that they abstract therefrom daily about one hundred pennyweights of gold. The irreparable character of the injury is a necessary legal inference from the facts admitted; so that, in the statements of the answer responsive to the bill, the court can find no sufficient denial of the complainant's equity. It is true that the answer states that complainant's title to the land passed from him to them by levy and sale under a judgment

against him, and that, in addition, he had parted with his title by deed to a third person.

Upon a motion to dissolve, the court can not take these statements as true; they are not responsive to the bill, and are matter in avoidance, which the defendants would be compelled to prove on the trial.

A defendant in equity can not both charge and discharge himself in his answer. The court, therefore, believe that upon the concession of the right of equitable interference in this case, there is not such a denial of the equity of the bill as can justify the dissolution of the injunction: 4 Johnson's C. Rep. 499; 2 Johnson's C. Rep. 88; 7 Vesey, 587.

Upon the question as to the power of a court of chancery to restrain a trespass, in the case made by this bill and answer this court entertains no doubt whatever.

Ordinarily all remedy for a trespass is at law, because ordinarily that remedy is quite sufficient.

And to the courts of law appertains the jurisdiction over titles to land. In all cases of ordinary trespass equity will leave the party to his redress at law. And in cases where she interferes to execute preventive justice by enjoining trespassers, she still forbears to intermeddle with the title.

The remedy which courts of law afford for trespasses is retributive; it is indispensable to any adequate protection of the rights of the citizen that there should exist somewhere a preventive power. This necessary power is wisely lodged with our courts of chancery, to be exercised with enlightened discretion by process of injunction. Any system of laws which afford no such power must be exceedingly defective. It is truly said by a learned English chancellor that the want of it would be a reproach to the "moral jurisdiction" of courts of chancery. The jurisdiction here claimed for a court of equity has been exercised in England since the time of Lord THURLOW; for the first case of injunction for trespass, so far as we are informed, was that of *Flammang* (cited in 6 Vesey, 147), under his administration. The jurisdiction was conceded by Lord ELDON in subsequent cases, and has been acknowledged in this country by repeated adjudications before the highest tribunals. Formerly it was exercised only to restrain waste between parties holding privity of title; now it is extended

to all cases of trespass attended with irreparable mischief, or which result in the destruction of the substance of the property, or to cases where a plaintiff at law can not prove his damage. Indeed trespass will now be enjoined in all cases where, from the nature of the trespass, or the circumstances of the parties, the remedy at law can not be full and adequate; such as the working of mines: 6 Vesey, 147; 7 Vesey, 370; destruction of timber: 10 Vesey, 290; 2 Hill's C. R. 617; the digging and amotion of stones of peculiar value: 17 Vesey, 128; quarrying common stone: 18 Vesey, 184.

The reasoning upon which all these cases are decided is very much the same. It starts with the assumption that all persons are entitled to be protected in the use, integrity, and value of their property; and where courts of law can not give such protection, whether because of the tardiness of the remedy, the peculiar nature of the property injured, the insolvency of the wrongdoer, or the plaintiff's inability to prove his damage, equity must needs interfere, in order that justice be done with her harsh but indispensable process of injunction. In the cases referred to the main inquiry was this: "Is the injury complained of likely to be irreparable?" and when charged so to be in the bill, and obviously, from the facts stated, truly charged, the injunction has not been withheld. The application of this test to the case now under consideration, will, it is believed, at once dispel all doubt as to the error of the circuit judge in dissolving this injunction. This question came under the review of Chancellor Kent in the last case which he tried before descending, at the bidding of the law, from the Bench; it is reported in 7 Johnson's C. Rep. 332, and the question is discussed with the great chancellor's usual learning and ability. See, also, 1 Swanst. 207; 15 Vesey, 138; 6 Johnson's C. Rep. 497; 1 Johnson's C. Rep. 318; Eden on Injunction, 229; 1 Paige, 97.

It is, however, contended by counsel for the defendant in error, that granting to a court of chancery the right to enjoin trespasses, in cases of irreparable injury, yet the interference of that court is limited to cases where the *title* of the complainant is not questioned by the answer, and inasmuch as this answer sets up title in the defendants, the injunction was rightfully dissolved. Where injunctions have been granted

to stay *waste*, as before stated, the cases have been founded on privity of title; and in such cases no question as to title could be made. The distinction, so far as the jurisdiction of chancery is concerned, between waste and trespass, has been broken down. Now injunctions will be granted against waste and trespass (6 Johns. C. Rep. 497), but against trespass in the cases before designated, and in all such cases, whether the title be brought in issue or not.

It seems, however, that where the complainant's title is denied, the courts will look more closely to the character of the trespass. In several of the cases relied upon by counsel for plaintiff in error, as shown by the comments of counsel for the defendants, there was no issue made about title. In other cases the title of the complainant was denied, or the defendants, justified under an adverse title, or a legislative or prescriptive right. In the case of 7 Johns. C. Rep. the defendants, who were charged with trespassing on the land of the complainant in digging stone and other material to construct a dam on the Hudson, sought to justify by claiming, in their answer, that they were acting on behalf of the State, and by authority of its statute laws.

The case in Hill's C. Rep., in its facts and doctrines, strikingly sustains the position taken by this court. In that case the bill was filed to stay trespass in cutting down and removing timbers from the complainant's land, near to Columbia, and charged to be valuable only for the firewood that was on it.

The defendant in his answer admits the alleged trespass, but insists that he has a perfect legal and equitable title to the premises. Here both parties claim the title. The chancellor granted the injunction, and upon appeal his decision was affirmed. In other cases, particular reference to which is not necessary, a similar state of facts is presented. Mr. Justice STORY, in commenting upon this head of equity jurisdiction says: "The interference of courts of equity in restraint of waste was originally confined to cases founded in privity of title, but at present the courts have, by insensible degrees, enlarged the jurisdiction to reach cases of *adverse claims and rights, not founded in privity*; as, for instance, to cases of trespass attended with irreparable mischief": 2 Story's Com. on Equity, 200. The point made by the defendant's counsel is met by this renowned commentator and in terms denied.

The reasons for giving to courts of equity, in our own State, this salutary jurisdiction, are conclusive, and apply with equal force nowhere but in countries where mines of the precious metals abound. They are found in the number and value of our gold mines, the facility with which, in a very short space of time, incurable injury may be done to the property, the impossibility, in almost every case, of demonstrating by proof at law the extent of the damage, and in those temptations which gold alone can offer to the cupidity of the lawless. It is no answer to say that an injunction may work ruin to an honest owner. The withholding it will more frequently work ruin to honest owners. Besides, the defendant is protected by the injunction bond. Upon reason and authority, therefore, this court determines that the jurisdiction in courts of equity to restrain trespass in all cases like the present, is fully established, and the order of the circuit judge dissolving the injunction must be reversed.

MCBRAYER ET AL. V. HARDIN ET AL.

(7 Iredell Eq., 1. Supreme Court of North Carolina, 1856.)

Distinction between mining, and other injunction cases. Injunctions to prevent persons from working a gold mine to which the plaintiff claims title, are not put upon the same footing with injunctions to stay execution on judgments at law, where the legal rights of the parties have been adjudicated. In the former class of cases, where it appears that if the defendants' allegations be true the injunction can do them no harm, but if plaintiff's allegations be true, he may sustain an irreparable injury—the injunction should be continued to the hearing, that the facts may be investigated.

Appeal from the Court of Equity of Cleaveland County, at the Fall term, 1849, his Honor, Judge ELLIS, presiding.

J. G. BYNUM, for the plaintiffs.

G. W. BAXTER and LANDERS, for the defendants.

PEARSON, J.

The plaintiffs allege that in July, 1849, they leased from the defendant, Joseph Hardin, for the term of five years thence next ensuing, a tract of one hundred and fifty acres of land, on which the said Hardin then resided, lying on the waters of Little Hickory creek, in the county of Cleaveland, adjoining the land of the widow Hogue, for the purpose of hunting for gold and silver mines, and with the right and privilege of working all the mines then known on the said land, or that might be discovered during the term of the said lease. The lease was reduced to writing and executed, and left with one Fullenwider for safe keeping, and the defendant, Joseph Hardin, afterward got possession of it and refused to return it.

The bill then states that afterward the defendants, Joseph Hardin and William McEntire, Jefferson Hoskins, Edmond Rippy, John Roberts and Dial Hardin, under his authority, entered on the land and have been working for gold, in despite of the rights and remonstrances of the plaintiff, and have done and are doing irreparable damage, by taking off large quantities of gold, and working the mines in an unskillful manner. The prayer is that the defendants may be enjoined from working on the land included in the lease to the plaintiffs, and for an account of the gold collected by the defendants.

The defendant, Joseph Hardin, answered, but he submitted to the decretal order, continuing the injunction until the hearing, and his answer was not sent to this court.

The defendants, McEntire and Hoskins, admit that in the month of August, 1849, with the consent of their co-defendant, Joseph Hardin, they worked on the land included in the lease for a short time, and made some seven pennyweights of gold each. They aver that they believed that the said Hardin had full power and authority to put them in possession, but being afterward informed by some of the plaintiffs that they were entitled to all mining privileges under their lease, they quit the land before the bill was filed and have not since interfered.

The defendants, Rippy, Roberts and Dial, positively deny

that they have ever worked for gold on the land included in the lease made by Joseph Hardin to the plaintiffs. They say it is true they have been working on land adjoining the land of the said Hardin, but the land on which they have been working belongs to the defendant, Roberts, and has been notoriously in his possession for more than twenty years, and never did belong to, or was in possession of the defendant, Joseph Hardin, and is not included in the land leased by the said Hardin to the plaintiffs.

The motion to dissolve the injunction was refused, and the injunction was continued until the hearing, from which order all of the defendants, except Joseph Hardin, appealed.

As to the defendants McEntire and Hoskins, they admit that they worked a short time under the license of Joseph Hardin after he had leased to the plaintiffs; but they say they had left the land before the bill was filed, and have no intention further to interfere. Such being the case the injunction can do them no harm, and at the final hearing their liability to account and their right to recover costs can be investigated and passed on.

As to the defendants Rippy, Roberts and Dial, they say the land on which they are at work is not included in the lease to the plaintiffs. If this be true the injunction does not interfere with them and will do them no harm. If it be not true, and they are, in fact, working on the land of Joseph Hardin, which he leased to the plaintiffs, then it is admitted that they should be enjoined. If the defendants tell the truth the injunction can do them no harm; but if the truth is as averred by the plaintiffs, a dissolution of the injunction would be of serious injury to them. Hence it was necessary, under the circumstances, to continue the injunction; by doing so no harm is done on one side and the chance of doing injury is avoided on the other. Injunctions of this kind are not put on the same footing with injunctions to stay executions on judgments at law, where the legal rights of the parties have been adjudicated.

This opinion will be certified to the court below.

The defendants must pay the costs of this court.

ANDERSON V. HARVEY'S HEIRS.

(10 Grattan, 386. Supreme Court of Appeals of Virginia, 1853.)

Adverse possession under color of decree without deed—Temporary occupancy, no disseizin. In 1807 a decree was made that the holder of a senior patent convey to the holder of a junior patent with equities, the interfering ground (called an interlock) covered by both patents. No deed was executed under this decree, but plaintiff went into and continued to hold possession though without any actual occupation of the interlock. There was no actual occupancy of the interlock until a purchaser under the defendant in the decree entered and cut the timber in 1836: *Held*, that the title of the party holding under the decree was a complete adverse possession to the extent of the limits of his patent, including the interlock. 2. That the temporary occupancy to cut timber was no disseizin.

¹**Deeds of same date construed together.** The devisees of the senior patent made on the same day two deeds to the same grantees in one of which the ground covered by the decree was excepted and in the other it was not: *Held*, that the two deeds were to be construed as one transaction and their effect was the same as if the exception had been mentioned in both.

Injunction without ejectment. Injunction against a trespasser to prevent his taking ore ought to issue in favor of a party in possession under a clear title without requiring him to bring an action at law.

Taking ore, a destructive trespass. The taking of iron ore from land of little or no value except for such iron ore, is a trespass going to the destruction of the estate.

Ascertainment of damages. The fact that the value of the ore taken could be readily ascertained does not deprive a court of equity of its right to interfere by injunction.

On the 12th day of December, 1785, a patent was issued to David Ross for twelve hundred acres of land lying on Catawba creek, in the county of Botetourt; and on the 13th of May, 1786, another patent issued to Ross for four hundred and eighty acres of land lying on the same creek. The boundaries of these two tracts interlocked, and both covered the piece of land which was the subject of controversy in this case.

On the 9th of June, 1787, a patent issued to Robert Harvey, assignee of Jacob Little, for three hundred and eighty-four acres of land on Catawba creek; and on the 11th of June, 1787, another patent issued to Harvey for twenty-one

¹ *Walker v. Tiffin Co.*, 2 Colo. 89; *Post* MORTGAGE.

hundred acres of land lying on the same creek. This patent was founded on an inclusive survey which embraced two tracts, one of three hundred and ninety acres, granted to Dennis Getty in 1772, and the other of three hundred acres, assigned to Harvey by James McGavock; and the residue, of the tract was never before granted. Harvey seems to have entered upon this land prior to 1807, and to have cleared a part of it and built a furnace upon it for making iron.

In 1803, Harvey filed his bill in the County Court of Botetourt against Ross, in which he charged that his patents were founded on older entries and surveys than Ross' patent for twelve hundred acres, and that Ross, with full knowledge of the plaintiff's claims, had fraudulently procured that patent, which comprehended a large portion of the tracts of three hundred and eighty-four acres, embraced in this patent, and he prayed that Ross might be compelled to convey to him the land included in his patent for twelve hundred acres, which was covered by the plaintiff's patents. Ross answered the bill, stating that in making his entries and surveys he relied entirely on the surveyor of the county; that there was no attempt to hurry through the proceeding, and that he knew nothing of the claims of the plaintiff set up in the bill. The cause came on to be heard on the bill, answer and exhibits, the latter of which were Harvey's patents and copies of entries, when the court made a decree that Ross should convey to the plaintiff with special warranty all the lands comprehended within the bounds of the plaintiff's patents for three hundred and eighty-four and twenty-one hundred acres, that were comprehended within the bounds of Ross' patent for twelve hundred acres, and that the plaintiff be quieted in the possession thereof. Nothing seems to have been done under this decree. Harvey continued in possession of his tract of twenty-one hundred acres up to the time of his death, in 1831, and there is some evidence, though it is rather doubtful, that he, at one time, took some iron ore from the land in controversy.

Ross acquired several other tracts of land adjoining the tract of twelve hundred acres, making in all between seven and ten thousand acres; but the precise boundaries or location of these several tracts do not seem to have been known with any certainty. He died in 1817.

Previous to July, 1834, William Ross seems to have acquired a right to the tract of twelve hundred acres patented as before stated to David Ross, and he had purchased of McDonald and wife, one of the heirs of Robert Harvey, a small tract of one hundred and sixty-four acres adjoining thereto; and on the 16th of July, 1834, he conveyed these lands to the Catawba Iron Works Company. In this deed the twelve hundred acre tract is conveyed as follows: "So much of a tract of twelve hundred acres of land, originally patented to David Ross, by patent bearing date the 12th day of December, 1785, as is now owned by the said William Ross, being all that part of the said tract not decreed to Robert Harvey by a decree rendered by the County Court of Botetourt, in the year 1807, in a cause therein depending between the said Robert Harvey as plaintiff, and the said David Ross, defendant;" and then the boundaries of the whole tract are given. William Ross did not have the legal title to this land; and by deed bearing date the 12th day of August, 1834, Frederick A. Ross, as executor and devisee of David Ross, and the other devisees of David Ross, conveyed this tract of land to the Catawba Iron Works Company, by the same description as that contained in the deed from William Ross. By deed of the same date the executor and devisees of Ross conveyed to the same company all the lands on Catawba creek and its branches, which they derived from David Ross. These tracts are enumerated in the deed and described by the quantity and date of the survey, with a general reference for a more particular description of the several tracts to the records in the surveyor's office. The number of tracts was twenty-two; and the whole quantity, as stated in the deed, eight thousand five hundred and twenty-nine acres.

The Catawba Iron Works Company having become very much embarrassed, by deed bearing date the 14th of August, 1840, conveyed all its property in trust for its creditors. This deed described the lands of the company as "one tract in the county of Botetourt, on the waters of Catawba creek, containing twelve hundred acres, be the same more or less; it being the same land purchased in part by William Ross from the representatives of David Ross, and conveyed by Frederick A. Ross, executor of David Ross, to the company, and in part

of the land purchased by William Ross of McDonald, one of the devisees of Harvey; also one other tract lying, etc., made up of several smaller tracts formerly owned by David Ross and conveyed by Frederick A. Ross, executor, etc., to the company, containing between seven and ten thousand acres."

A suit in equity having arisen out of the last mentioned deed, in the Circuit Court of Botetourt, the land was sold under a decree of that court, and the commissioners, by their deed bearing date the 10th of December, 1847, conveyed the land to the purchasers, William S. Triplett, executor of John R. Triplett, and Peachy R. Grattan, executor of D. I. Burr, they being the creditors entitled to the proceeds of the sale. This deed recites the decree directing the sale, and conveys all the real estate which belonged to the Catawba Iron Works Company, and which was conveyed by that company to trustees as aforesaid, and the land is described as in that deed. By another deed bearing date the 11th day of January, 1848, these executors and the devisees of David I. Burr and John R. Triplett conveyed to Joseph R. Anderson, John T. Anderson and William N. Anderson, these same lands as embraced in the deed from the Catawba Iron Works Company to trustees as aforesaid, and which were afterward sold by commissioners under the decree of the Circuit Court of Botetourt, and conveyed by them to the said executors. And John T. and William N. Anderson in December, 1848, conveyed their interest in these lands to Joseph R. Anderson.

In 1849 Joseph R. Anderson, being engaged in making iron at the furnace on the lands aforesaid, commenced to raise ore from a mine situate on a part of the land included within the boundaries of the patents for twelve hundred and four hundred and eighty acres, which had been issued to David Ross as before stated, and which was also included within the boundaries of the patent to Harvey for twenty-one hundred acres. And thereupon the devisees of Harvey applied to the Circuit Court of Botetourt county for an injunction to restrain him from raising ore within the boundaries of their said tract of land. In their bill they set out their original title to the land and the decree of the County Court of Botetourt of 1807. They charge that soon after said decree, Harvey took possession of the land covered by his patent and that of Ross for twelve

hundred acres, and took ore from thence for the supply of his furnace, and that he held peaceable possession of it until his death, in the year 1831. They say that it does not appear that Ross ever executed the deed directed by the decree of 1807, but that in all the conveyances of the tract of twelve hundred acres by the heirs of Ross and those claiming under them, the rights of Harvey under his patent and the decree aforesaid are expressly recognized and reserved. They therefore pray for an injunction to restrain Anderson and his agents from raising ore on said land until the rights of the parties may be determined by proper legal proceedings, and for general relief. The injunction was granted.

Anderson demurred to the bill and also answered. He said that he received a conveyance for the land with general warranty, and deemed it unnecessary, therefore, to make any particular examination of the title. That by the conveyances to him he was invested with the legal title to the lands and ore bank claimed by the plaintiffs, and that in these deeds there was no reference to the decree of 1807. That he had never heard of that decree or that Harvey or his devisees had ever set up a claim to any portion of the lands which he had purchased and which had been conveyed to him, as hereinbefore mentioned, until shortly before the institution of this suit. That he had never seen the deeds in which this decree is referred to until this suit was commenced; and he denies that the grantors in these deeds recognize any right in Harvey under said decree; they only recognize the existence of the decree. That he holds the ore bank and lands in controversy under the other deed executed by the executor and devisees of David Ross, which conveys the tract of four hundred and eighty acres, and which includes the ore bank. He denies that Harvey took possession of the land in controversy shortly after the rendition of the decree, and he believes he never did take possession of it, or that he took any ore from the mines within the interlock at any time previous to 1829. That probably, after 1828, his furnace was supplied in part with ore taken from thence in 1829 and 1830, but he had ceased to take it for more than a year before his death, in 1831. That this was not raised by Harvey or persons under his direction, but by persons from whom he bought the ore by the

load and who raised the ore wherever they chose to get it, whether on Harvey's or the adjoining lands; and that in fact a large portion of the ore used by Harvey at his furnace was taken from lands of Ross to which Harvey never pretended to have any title. That the Catawba Iron Works Company took possession of the land in controversy under the patent to David Ross and the conveyance to them; that they cut a large portion of the timber off the land and coaled it upon the land within the bounds of the interlock and within a few yards of the ore bank in controversy.

The defendant further answering insisted that the decree of 1807 conferred no title on the plaintiffs to the land in controversy. That unless it could be carried into execution it was a mere nullity, and whether it could be executed could only be ascertained by the plaintiffs' filing a bill against the representatives of Ross to enforce it. That the decree was illegal and erroneous and ought never to have been pronounced, as was apparent from the record of the cause which he exhibited. That he was a *bona fide* purchaser without notice of the plaintiffs' claim; and having the legal title and at least equal equity, his was the better right, and ought not now to be disturbed after the plaintiffs had slept upon their rights, if they had any, for more than forty years.

By a survey made in the progress of the cause, it appeared that the line of Harvey's tract of twenty-one hundred acres included the ore bank in which the defendant had raised ore by a few feet. And it appeared from the testimony, which was voluminous, that ore had been raised at this place by persons who sold ore to Harvey, and probably, though this is somewhat uncertain, that at one time persons in the employment of Harvey raised some ore at the same place. It was proved that in 1836 or 1837 the Catawba Iron Works Company cut the wood off the land in the interlock and there converted it into coal. No person in the neighborhood seems ever to have heard of the decree of 1807.

The cause came on to be heard in April, 1850, when the court held that the rights of Harvey and Ross to the land in controversy were settled by the decree of 1807. That this decree equally effected any rights to this land which Ross may have had under his patent for four hundred and eighty acres.

That as Harvey and those claiming under him, had been in possession of the tract of twenty-one hundred acres ever since said decree, operating a furnace situate upon it during a large portion of the time, they must be regarded as in possession of the interlock as part of the said tract, even if it was not proved that they had actual possession, at any time, of the said interlock, until an adverse possession of Ross or those claiming under him was proved. That the acts relied on by the defendant to prove adverse possession did not amount to an ouster of the heirs of Harvey, and that they must be considered as in possession when the defendant entered upon the land, and that they were entitled to the protection of the court to avoid the injury complained of in the bill. It was therefore decreed that the injunction be perpetuated with costs. From this decree Anderson applied to this court for an appeal, which was allowed.

J. T. ANDERSON and MICHIE, for the appellant.

BAXTER, for the appellees.

DANIEL, J.

The bank or mine of iron ore, to restrain an alleged trespass on which the injunction in this case was allowed, is, according to the surveys and testimony in the cause, situated in the interlock caused by the interference of the bounds of Harvey's patent for twenty-one hundred acres, granted on the 11th day of June, 1787, with those of Ross' patent for twelve hundred acres, granted on the 12th day of December, 1785, and is therefore clearly embraced by the terms of the decree pronounced on the 10th of February, 1807, by the County Court of Botetourt in the case of *Harvey v. Ross*. That decree has never been reversed, and, so far as the proofs in the cause show, its force and validity were never denied by Ross in his lifetime. Indeed no question as to the correctness of the decree, or as to the right of the County Court of Botetourt to make it, ever seems to have been made before the commencement of this suit. On the contrary, in the deed of the 12th of August, 1834, made by F. A. Ross, exec-

utor and devisee, and Myers and others, also devisees of David Ross, and also in the deed of William Ross and wife of the 16th July, 1834, to the Catawba Iron Works Company (under whom the appellant claims), conveying the several interests of the parties in the twelve hundred acre tract, express reference is had to the decree, and each deed purports to convey only so much of the tract as was not decreed to Robert Harvey by said decree.

On the same day on which F. A. Ross, executor, etc. and others executed the deed above mentioned, to wit, the 12th August, 1834, they also made another deed to the Catawba Iron Works Company, conveying, with special warranty, "all their lands on the Catawba creek, etc., being the lands which David Ross had title to at his death, and of which his heirs or executors were seized at his death," etc. In the description of the lands intended to be conveyed is embraced "four hundred and eighty acres, surveyed March 25, 1785."

A patent founded on this survey was issued to Ross on the 13th of May, 1786. The interlock before mentioned, as appears from the survey and other proofs in the case, is also covered by this patent. No mention, however, of this patent, is made in the decree of 1807, nor in any of the proceedings in the suit in the County Court of Botetourt.

Still as the decree directed Ross to convey to Harvey all the lands comprehended within the twenty-one hundred acre patent that were also comprehended in the twelve hundred acre patent, it is difficult to conceive how he could ever have made any opposition to the decree, or to any rights claimed under it, by showing that he held, at the time the decree was rendered, another patent covering the interlock, subsequent in date and consequently necessarily inferior, as an evidence of title, to the one which the court had declared insufficient to protect him against Harvey's superior equity. The decree directed the interlock to be conveyed, and whatever effect the decree had to deprive Ross of, or render inoperative the title he had disclosed and relied on, *a fortiori* it had in respect to a younger and inferior title which he had not thought proper to disclose.

The two deeds of the 12th August, 1834, made between the same parties and contemporaneous in date, must be re-

garded as parts of one transaction, and as constituting in law one entire deed. Though, therefore, the deed in which the four hundred and eighty acre survey is conveyed makes no exception of the part thereof which was embraced within the bounds or the twenty-one hundred acre patent, yet as the deed conveying the twelve hundred acre tract does make the exception of it in excepting all which had been decreed to be conveyed to Harvey, the effect of the two deeds taken together is to except out of the grants in each, the land in question, as fully as if the exception had been expressed in terms in each deed.

It is in proof that Harvey took possession of a portion of his tract of twenty-one hundred acres as early as in the year 1805, and that he continued to occupy, cultivate and otherwise enjoy it as owner till his death, in 1831; and this possession has been continued by his representatives ever since. It is also proved that in the years 1828 and 1829 he obtained ore from the land in question for the purpose of operating his furnace. Apart from this latter proof, the occupation of a portion of his tract by Harvey and those claiming under him, and the continued use and enjoyment thereof, accompanied by the notice which his suit in the County Court of Botetourt gave of the extent of his claim, constituted, in the absence of any proof of an adversary possession by Ross and those claiming under him, of the portion of land in dispute, an adversary possession of all the land within the limits of his patent. And this possession, without calling in the aid of any presumption that Ross had executed a deed for the land which the decree had directed him to convey, had ripened into a full and perfect title long before the year 1836, when the Catawba Iron Works Company commenced converting into coal, wood upon a portion of the interlock: *Taylor v. Burnsides*, 1 Gratt. 165; *Overton's Heirs v. Davisson*, Ibid. 211.

This temporary possession by the company for the purpose above mentioned, commenced in 1836 and abandoned in 1837 or 1838, could not operate to disseize Harvey's representatives of the land in question: *Pasley v. English*, 5 Gratt. 141.

When, therefore, the deed of trust of the 14th August, 1840, was executed by the company, they had no possession, actual

or constructive, of the ore bank in controversy. But the said bank was in the exclusive adversary possession of the appellees claiming and holding it by a perfect title. The deed of the company, therefore, could convey no shadow of right to the ore bank in dispute as against the appellees. The only effect it can have on their rights is, on the contrary, one of a beneficial character; inasmuch as it served to notify all claiming under it that the right to the land in controversy was never in the company, but resided with the Harveys. The description of the land intended to be conveyed, expressly referring to the deed of the Rosses, heretofore mentioned, in which the exception in favor of Harvey is made. The deed from Francis T. Anderson and A. P. Eskridge, commissioners, etc., of the 10th December, 1847, has a like reference to the deed executed by F. A. Ross, etc., for the twelve hundred acres; and though the deed from Grattan and Triplett, etc., the purchasers at the commissioners' sale, to the appellant and John T. and William N. Anderson, has no such reference, yet it has a reference to the deed executed by the commissioners and also to the decree under which they sold.

I think it is clear, that at the time of the alleged trespass on the ore bank by the appellant, the appellees must be regarded as in possession of it with a clear and incontestable title. They might have instituted their action of trespass against the appellant; but were they bound to do so before, or instead of applying to a court of equity to restrain the appellant from committing further trespass on the property in dispute? Were they bound to litigate and discuss in a court of law rights which had not only been adjudicated as far back as 1807, but which had been solemnly recognized in the conveyances to which the appellant must necessarily refer as the sources of any title which he could assert? I think not. The practice of courts of equity of interfering in such cases by way of injunction, is one comparatively of recent origin; but the jurisdiction is now fully recognized and well established by cases both in England and America: *Mitchell v. Dors*, 6 Ves. R. 147; *Hanson v. Gardiner*, 7 Ves. R. 305; *Thomas v. Oakley*, 18 Ves. R. 184; 3 Daniell's Ch. Pr., 1852-3; *Stevens v. Beekman*, 1 John. Ch. R. 318; *Jerome v. Ross*, 7 John. Ch. R. 315; *Smith v. Pettingill*, 15 Verm. R. 84.

The land upon which the trespass is alleged to be committed is proved to be of little or no value, except for the iron ore found on it, which is proved to be of an excellent quality. The trespass is one which goes to the change of the very substance of the inheritance, to the destruction of all that gives value to it. The fact proved by the appellant that the value of the ore per load could be readily estimated, does not deprive a court of equity of its right to interfere in the case by way of injunction. The same might be shown in most cases of the kind. The products of most mines have a value already fixed or easy of ascertainment by proof; yet it was in prevention of like trespasses to this very species of property, mines of ore, coal, etc., that the jurisdiction in question had its origin, and still continues to be most frequently exercised.

I see no error in the decree of the circuit court, and think it should be affirmed.

ALLEN, MONCURE & LEE, JJ., concurred in the opinion of DANIEL, J.

SAMUELS, J., dissented.

Decree affirmed.

BOYLE ET AL. V. LAIRD ET AL.

(2 Wisconsin, 431. Supreme Court, 1853.)

Lessees protected against trespassers—Writ expires with lease. A party claiming the right to work lead mines as a lessee may be protected against a trespasser by injunction, but after the lease has been terminated by a sale of the premises the lessees have no longer any rights to protect, and although the lease contains a general covenant for renewal, the bill for injunction should be dismissed.

Conveyance, pending trial. Where plaintiffs have parted with their interest in the subject matter, the suit can not proceed until the proper parties are substituted, if the objection be insisted on.

General relief. General relief should not be granted on a bill praying only the issuance of an injunction.

The bill filed in this case charges the defendants with trespass and waste upon a certain lot of land in the possession of the complainants as lessees, by digging and taking lead ore

thereout, and converting the same to their own use. An injunction was prayed for and granted, and the defendant Boyle answered, denying the material charges of the bill.

The cause being submitted, on replication filed, the court decreed that the defendants should be perpetually enjoined from interfering with the rights of the complainants.

To reverse this decree, the defendants appeal to this court.

DUNN, COLLINS & SMITH, for appellees.

J. H. KNOWLTON, for appellants.

CRAWFORD, J.

The bill of complaint in this case was filed to obtain a writ of injunction to restrain the defendants from committing waste upon a certain lot of land in the possession of the complainants as lessees of Daniel G. Whitney. The land is situate in the county of La Fayette and was held and enjoyed by the complainants, at the time of the filing of the bill, for the purpose of mining for lead ore thereon. The right of the complainants to the occupancy and use of the lot was derived from a lease given to them by the above named Whitney by his attorney in fact, John Burrell, which lease was to continue for the term of one year from the date thereof subject to be renewed, provided the land did not "change owners."

The date of the lease was the 26th day of January, 1850, and the bill of complaint was filed on the 15th day of April next thereafter. The material charge in the bill is that the defendants had before that time illegally entered upon the lot in question and had taken away and disposed of large quantities of lead ore from the "diggings" of the complainants, and were then engaged in illegally removing and converting to their own use large quantities of lead ore of great value, to the great injury of the complainants.

The prayer of the bill was for a writ of injunction to stay and prevent the commission of further "waste and spoil" on the premises, and that the same, on a final hearing, might be made perpetual.

The court commissioner of La Fayette county allowed a writ of injunction, as prayed for, which was issued.

The defendant Thomas Boyle filed an answer denying the material charge of the bill, and the other defendants (Tierney, Harkin and Meloy), being severally under the age of twenty-one years, put in the usual answer by their *guardian ad litem*. A replication to these answers was filed, and the cause was heard in the Circuit Court of the county of La Fayette at the October term, 1851, and at the March term, 1852, a decree was rendered, declaring the complainants to be lessees of the lot described in the bill of complaint, and perpetually enjoining the defendants from interfering with or molesting the complainants in the enjoyment of the said lot.

The proofs submitted on the hearing, whatever they may have been, have not been preserved or returned to this court, but a stipulation as to the facts proved at the hearing has been signed and filed here, from which we find that during the continuance of the lease to the complainants the defendants did enter upon the premises and dig and take lead ore therefrom, and convert the same to their own use; that Burrell, the attorney in fact of Whitney, had, during the year 1850 and within the term specified in the lease, purchased the tract of land on which this mining lot was situated, from Whitney and was, at the time of the hearing, the owner of said land; that he (Burrell) had not, since the 26th day of January, 1851, received any rent from the complainants, or either of them, and since that date had not recognized or treated them, or any of them, as tenants or as having any right on said land; that the lease to the complainants had not been renewed, and he did not intend to renew it.

Independent of the objection that many of the material averments in the bill, which are admitted by the answer of the defendant Boyle, are entirely without proof as against the infant defendants, we can find nothing in the case to sustain the decree of the court below. At the time of the filing of the bill, these complainants were lessees of the premises, but before the cause was brought to a hearing, their character of lessees had ceased, and they had, at the time of the hearing, no right or interest in the premises whatever, as appeared from the testimony of the owner of the soil. It is true the lease contained a provision for renewal, but upon what terms and for what length of time the lease should be

renewed, it is altogether silent, and we think that this provision or covenant is void for uncertainty, as it appears in the lease, and there is nothing in the evidence before us which enables us to render it certain. This principle is fully discussed and established in the following cases: *Blagden v. Bradbear*, 12 Vesey, 466; *Clinan et al. v. Cooke et al.*, 1 Sch. & Lef. 22; *Bromley v. Jeffries*, 2 Verm. 415; *Bailey et al. v. Ogden et al.*, 3 John. 399; *Clerk v. Wright*, 1 Atk. 12.

Besides, the renewal was to depend on the fact of the ownership of the land remaining unchanged, and the proof shows that the land has been sold and conveyed by the lessor, Whitney, to the witness, Burrell, during the term for which the lease was granted.

The question, then, is whether the complainants are entitled to the relief which is prayed for in the bill, when it is shown that they have ceased to have any interest in the premises to which the injunction extended. While they were lessees, they might, in a proper case, invoke the protection of a court of equity, to prevent waste or irreparable injury; but when not only the defendants, but the complainants themselves, have no right, title or interest whatever in the land covered by the injunction, it would, we think, be a useless application, nay, a prostitution of the powers of the court. The complainants have no rights to be invaded or protected, although when the bill was filed they had such rights.

The general rule is that the parties really in interest must be before the court; and if a complainant or complainants (if there be more than one) after the commencement of the suit parts with his or their interest in the subject, by assignment or otherwise, the suit can not be proceeded in until the proper parties are brought in, if the objection be urged: *Williams v. Kinder*, 4 Vesey, 397. The defendant, in such case, may apply to the court for an order that the assignee or party in interest file a supplemental bill, in the nature of a bill of review, by a certain day, or in default thereof that the bill be dismissed: *Garr v. Gomez*, 9 Wend. 649.

We are satisfied that in this case the court should not have rendered a decree perpetuating the injunction, and it could have rendered no other relief because that was the specific relief prayed for, and the rule is well settled that when some

specific relief is prayed and is not accompanied with a prayer for general relief, if the whole case made will not justify the granting of the particular relief applied for, the bill must be dismissed, although the complainant may have been entitled to some other aid: *Vide* 13 Vesey, 119; 2 Young & Jarvis, 33; 1 John. Ch. R. 117; 2 Peters, 595; 1 John. 559; 2 Paige, 396.

The proper course to have been pursued by the court below was to dismiss the bill without costs; for it was shown that the defendants had committed trespass, if not waste, on the premises during the complainants' term.

The decree below must be reversed and the bill dismissed without costs, and without prejudice to the rights of the complainants to bring an action at law for the lead ore taken by the defendants, as they may be advised.

Reversed.

WALDRON ET AL. V. MARSH ET AL.

(5 California, 119. Supreme Court, 1855.)

Trespass—Irreparable injury. An injunction will not be granted in aid of an action of trespass, unless it appear that the injury will be irreparable, and can not be compensated in damages.

¹ **Sufficiency of affidavit alleging irreparable injury.** It is not sufficient that the affidavit should allege that the injury will be irreparable; it must be shown to the court how and why it would be so; otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's right.

Appeal from the District Court of the Tenth Judicial District, Nevada County.

The facts appear in the opinion of the court.

FRANCIS J. DUNN, for appellants.

SEARLES & TWEED, for respondents.

No briefs on file.

¹ Compare *Crisman v. Heiderer*, 5 Colo. 539; *Anderson v. Harvey*, 7 M. R. 291; *Moore v. Ferrell*, 7 M. R. 231; *Brown v. Ashley*, 16 Nev. 312; *Thorn v. Sweeney*, 7 M. R. 564; *Henshaw v. Clark*, 14 Cal. 460; *Post* TRESPASS.

HEYDENFELDT, J., delivered the opinion of the court. MURRAY, C. J., concurred.

An injunction ought not to be granted in aid of an action of trespass, unless it appear that the injury will be irreparable, and can not be compensated in damages.

In this case, how the cutting of a ditch through the plaintiff's land would be such an injury I can not imagine. It is not sufficient that the affidavit alleges that the injury would be irreparable; it must be shown to the court how and why it would be so; otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's rights.

The injunction in this case ought not to have been granted, and the order dissolving it is affirmed.

Affirmed.

SMITH V. THE CITY COUNCIL OF ROME.

(19 Georgia, 89. Supreme Court, 1855.)

¹ **Right of way—Stone.** A gift of the right of way (the right to open a public street) is not a gift of the rock and other materials within the boundaries of the way.

Waste—Practice. It has become almost a matter of course to grant an injunction to stay waste.

Application for injunction. Decision by Judge TRIPPE, at chambers, 27th June, 1855.

Wm. R. Smith prayed an injunction on the following facts: He was the owner of a parcel of land within the corporate limits of the city of Rome, upon which lot there is a valuable stone quarry, worth \$3,000, upon the bank of Etowah river; also a valuable sand bank, worth \$1,000; and the piece of land is also of great value as a residence, viz., \$2,500. The mayor and council of Rome quarried large quantities of rock from the said land, removed trees therefrom, and thereby caused irreparable injury to the lot. The bill alleged that Rome was

¹ HIGHWAY notes, 7 M. R. 202.

a growing city, and that the value of this quarry was increasing rapidly, and would be very great; that a part of the rock is limestone, and will be immensely valuable for burning of lime; that there is also a ferry landing on this lot, which communicates with valuable land on the opposite side of the river, and that the said corporation is destroying the usefulness of the said ferry landing. The bill prayed for an injunction.

The mayor and council answered, that upon the application of complainant, they had laid out two streets over his land, and declared the same public streets; that they have only cut down these streets so as to make them level and passable; and in so doing have used the rock for macadamizing some of the streets of the city, and building a few culverts; that the sand bank alluded to is in the street. The value of the property was admitted, but the damage done denied; and especially that it was irreparable.

The court refused the injunction, and this decision is assigned as error.

WRIGHT, for plaintiff in error.

T. W. ALEXANDER, for defendant in error.

By the court, BENNING, J., delivering the opinion.

In this case, we assume that the answer is true.

The answer says, in substance, that the complainant gave to the defendant the right to open two public streets through his land; that the defendant, in the exercise of this right, opened the two streets; that a "high rocky bluff" projects itself a part of the way across the track of one of the streets; that the defendant took from this bluff, at a point within the boundaries of the street, some rock, and used the rock in macadamizing the streets of Rome, and in building culverts; and that the defendant claims the right thus to take and use such of the rock as is within the boundaries of the street.

The first question therefore is whether the defendant has this right?

The gift, by the complainant to the defendant, was that of the right of way over his land. It was no more than that.

Is a gift of the right of way a gift of the earth, rock, trees, and other materials which may happen to exist within the boundaries of the way? Is a gift of the right of way a gift of all the gold that may exist beneath the service of the way, the right to which is given?

In *Goodtitle ex dem. Chester v. Alker and Elmes*, 1 Burr. 143, Lord MANSFIELD said: "1 Ro. Abr. 392, Letter B. Pl. 1, 2, is express, 'that the king has nothing' but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil.' So do all the trees upon it and mines under it (which may be extremely valuable). The owner may carry water in pipes under it. The owner may get his soil discharged of this servitude or easement of a way over it, by a writ of *ad quod damnum*."

And in *Lade v. Shepherd*, 2 Str. 1004, which was an action by the owner for trespass done by the appropriation of a part of a street which he had laid out on his land, the court say, "It is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage. But it never was understood as a transfer of the absolute property in the soil."

To the same effect is 2 Inst. 705; see Woolrych on Ways, 5.

(1.) A gift, then, of the right of way, is not a gift of the earth and other materials that may exist within the boundary lines of the way, the right of which is given.

It follows that the defendant did not have the right to take rock from the "rocky bluff" aforesaid, to be applied to the macadamizing of the streets of Rome, and to the building of culverts. The defendant, no doubt, has the right to level the bluff, so as to make the street passable the whole width of it. In the right to make the street is implied the right to do this. The defendant having the right to make the street, has a right to do everything requisite to the making of the street. And this is the limit of the defendant's right. The fragments of rock that might result from the process of leveling the bluff, would belong, not to the defendant, the owner of no more than the right of way, but to the complainant, the owner of the soil.

The next and only other question is, whether the complainant had the right to an injunction to stop the defendant from

taking rock from the "rocky bluff" aforesaid, and applying it to the uses of the city of Rome in macadamizing streets and building culverts? (2.) And we think he had. Taking rock for the purpose of applying it to the uses aforesaid, would amount to the commission of waste: Com. Dig. Wast., D. 4. And an injunction to stay waste has become almost a matter of course: *Moore v. Ferrell et al.*, 1 Ga. 11; Eden on Inj. 198-9.

We think, therefore, that an injunction to prevent the defendant from taking the rock, to be applied to the uses aforesaid, should have been granted.

¹MERCED MINING CO. v. FREMONT ET AL.

(7 California, 130. Supreme Court, 1857.)

²Appeal no supersedeas to injunction. Where an injunction has been granted and an appeal is taken by the defendants from the order allowing the injunction, the injunction is not dissolved nor superseded by the appeal.

Mandamus to compel enforcement of injunction. Mandamus will lie to the judge of the court below from whose court an injunction has issued to compel his issuing attachment to enforce the injunction pending an appeal thereon.

³Proceeding in contempt to protect private rights. Where the proceeding by attachment for contempt is in substance to secure the rights of the party injured (as in case of defendants continuing to mine while under injunction), the court regards the substance and not the form, and will issue mandamus to compel the court below to inquire into the acts charged.

Application for mandamus to the Judge of the Thirteenth Judicial District.

While the proceedings in this case were pending in the court below the plaintiffs obtained an order granting an injunction which was accordingly issued. From this order the defendants appealed to this court and gave an undertaking for three hundred dollars. After the appeal was taken the

¹ S. C., *post*. 313.

² Cited *Hicks v. Michael*, 15 Cal. 110; *Slaughter House Cases*, 10 Wall. 232.

³ *Vanzandt v. Argentine Co.*, 7 M. R. 634.

defendants continued the alleged acts of trespass enjoined by the writ. The plaintiffs applied to the judge of the district court for an attachment against defendants for a contempt of court in disregarding the injunction. The judge rejected the application and refused to inquire into the acts charged. The plaintiffs then applied to this court for a mandamus to compel the judge to issue the attachment and proceed to inquire into the acts alleged against the defendants. An alternative writ was issued on the thirteenth day of February, 1857, returnable on the twenty-third of the same month, which was regularly served on the seventeenth. On the return of the writ the plaintiffs moved this court to make the writ peremptory.

BOORAEM, for petitioner.

The points made are stated in full in the opinion of the court. (Cited Title IX, Chap. 2, Practice Act; *Sea Insurance Company v. Ward*, 20 Wend. 588; *Hart v. Mayor of Albany*, 3 Paige, 381; *Russell v. Elliott*, 2 Cal. 245; *People v. Olds*, 3 Cal. 167; *People v. Bell*, 4 Cal. 177; *Commonwealth v. Hampden*, 2 Pick. 414; *Johnson v. Randall*, 7 Mass. 340; *Tuolumne County v. Stanislaus County*, 6 Cal. 440; *Johnson v. Randall*, 7 Mass. 340; *Squier v. Gale*, 1 Halst. 157; *Kimball v. Green*, 2 Metc. 573; *Ex parte Crane*, 5 Pet. 190; *People v. Judges of Washington*, 1 Caines, 511; *People v. Common Pleas*, Coleman, 61; *People v. Superior Court*, 10 Wend. 285; 5 Id. 114; *Ex parte Chamberlain*, 4 Cow. 49.)

BOTTS, *contra*.

No brief on file.

BURNETT, J., delivered the opinion of the court, TERRY, J., concurring.

On the hearing of this motion the plaintiffs' counsel made these six points:

"First, that the stay of proceedings granted or effected by an appeal is only, as to further proceedings, working a change

in the relative positions of the parties and the property affected by the action after appeal taken. Second, that the appeal is taken only from the order granting the injunction, and not from the injunction itself, which remains in force until dissolved by the appellate court. Third, that if an appeal acts as a *supersedes* to the injunction, the injunction, as a remedy, is in effect abolished. Fourth, that the district judge had no discretion to grant or refuse the order for an attachment for the contempt, but was bound in law to issue it. Fifth, that a mandamus will lie to compel him to do so, his refusal not being the exercise of a discretionary power, and there being no other adequate remedy. Sixth, that the writ of mandamus will lie to compel a judge to punish a contempt when the rights of parties are involved."

The first question raised by the facts of this case is this: Did the appeal supersede the effect of the injunction? or, did the injunction remain in full force pending the proceedings on appeal?

The stay of proceedings pending an appeal has the legitimate effect of keeping them in the condition in which they were when the stay of proceedings was granted; it operates so as to prevent any future change in the condition of the parties. This would seem evident from the scope of the provisions of chapter 2, Title IX, of our Practice Act. To render an appeal effectual for any purpose, in any case, the undertaking or deposit must be given, or made as provided in section three hundred and forty-eight. In sections three hundred and forty-nine to three hundred and fifty-two, inclusive, a stay is granted by executing another and different undertaking. In the three hundred and fifty-sixth section it is provided that in cases not provided for in the sections above, the giving the undertaking, or making the deposit named in section three hundred and forty-eight, shall stay proceedings in the court below upon the judgment or order appealed from.

The language of this three hundred and fifty-sixth section is general and would at first seem to include the appeal from an order granting an injunction; but, upon an examination of the provisions of sections three hundred and forty-nine to three hundred and fifty-two, inclusive, it will be seen that in all those cases the party is required by the judgment or order

to do some affirmative act, not to refrain from doing a thing. This act, if completed, would change the condition of the parties and render a reversal of the judgment in the Supreme Court partially ineffectual. But when a party is restrained by injunction he is not injured in contemplation of law, as he is already secured by the undertaking. If, on the contrary, an appeal with an undertaking of three hundred dollars would have the effect of staying the injunction itself, then the plaintiff would have no remedy, and the writ be idle. It would entirely destroy the usefulness of this writ. A stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction.

That the distinction between cases mandatory and prohibitory is correct, may be seen from the exception to section three hundred and fifty-six. If, then, the injunction remained in full force, had the judge any discretion to issue or not to issue the attachment? and if he had no discretion, but his duty was positive, is a mandamus the proper remedy?

It would seem clear that, if the injunction was not affected by the appeal, there must be some remedy for its violation pending an appeal; for if there be no remedy for the wrong, the right injured does not exist. No right can exist, in contemplation of law, that can not be injured, and there can be no injury without a remedy. Where, then, can this remedy be found but in the district court? That court must protect the parties in their substantial rights.

As to the other question, whether the remedy is by mandamus or appeal, we think there can be but little doubt. The remedy by appeal is too slow, and is not adequate. The duty to be performed is fixed by law, and certain. As to how that duty is to be performed, this court will not direct. All we can do by this writ is to direct the judge to exercise his discretion in inquiring into the acts charged, and rendering his decision upon them. The decisions of this court have fully settled some of these points: 3 Cal. 167; 4 Cal. 177; 2 Cal. 245.

It was urged, upon the hearing of the motion, that a mandamus would not lie from this court to an inferior court in a case of contempt. It is true that the proceeding is, in form,

a case of contempt, while it is, in substance, a private right. The law regards the substance more than the form. From the very nature and necessity of the case, the proceeding is designed to secure the rights of the party; this is his only remedy. It is always upon his application that the action of the court is invoked.

Motion sustained.

¹MERCED MINING CO. V. FREMONT ET AL.

(7 California, 317. Supreme Court, 1857.)

Trespass enjoined, as well as waste. Courts now restrain destructive trespasses, and the distinction which once confined their interference to cases of technical waste has been discarded.

¹**Special case of gold mines.** The principle upon which destructive trespass is restrained applies to gold mines as well as others. If a party remove, he removes all that is of any value in the estate itself. It is emphatically taking away the entire substance of the estate; another material circumstance is the absence of any mode of fixing the amount of damage to the mine.

Irreparable injury. Taking away the minerals is in itself an irreparable injury; and the mere statement of this fact is a compliance with the ruling that the complaint must state *how* the injury is irreparable.

Insolvency is not necessary to be alleged where the right depends upon the nature of the injury.

Status of possessory claims. The appropriation of the public mineral lands and development of the same under the license and acquiescence of the Federal and State governments considered as fixing the status of mining interests in California.

²**Implied license; right of holder to protect his claim.** Under the legislation and implied license of the State and of the United States, the owner of a mining claim has a good vested title to the property, and it should be so treated until his title is divested by the exercise of the higher right of the superior proprietor; and in the meantime his right to protect the property is as full and perfect as if he were the tenant of the superior proprietor.

Due discretion should be used in the granting of injunctions to restrain alleged irreparable mischiefs. When title is in dispute the court should be more cautious; but in all cases it is a matter of sound discretion.

¹ S. C., *ante*, 310.

¹ *Moore v. Ferrell*, 7 M. R. 232.

² *Sparrow v. Strong*, 2 M. R. 320.

Preservation of property pending litigation. Where there is reasonable ground to apprehend irreparable mischief pending the litigation, and the title be matter of doubt, the courts should restrain both parties or appoint a receiver.

Appeal from the District Court of the Thirteenth Judicial District, County of Mariposa.

This is an appeal from an order of the court below, granting an injunction. The plaintiffs allege that they are the owners and possessors of certain described real estate and veins of gold-bearing quartz; that they took possession of them, and have been working them for the purpose of extracting the gold from the rock, and have expended upon the property upwards of eight hundred thousand dollars; that defendants claim an interest adverse to the plaintiffs, but that the defendants have no title; that the title to the minerals in the soil of California is in the State; that defendants are trespassing upon a portion of the premises, and working the mineral veins therein, and avow their intention to take possession of the entire property. The complainants pray that the adverse claim of defendants may be determined by the court, and for an injunction pending the litigation, and that the same, on the hearing, may be made perpetual.

ROBINSON, BEATTY & BOTTS, for appellants.

It is urged that the order granting the injunction should be sustained, because the complaint alleges ownership in the plaintiff, and that character of injury which the law esteems irreparable; and in support of this last proposition, we are referred to Sec. 929, Story's Eq. Juris.

There is no doubt that the remedy by injunction has been extended by modern decisions to the case of a mere trespasser, where the injury committed has been one that, if done by a privy in estate, would have been what is technically known as waste.

As this court has frequently said, this writ of injunction is the right arm of the law, and is not to be brought into exercise upon trivial and ordinary occasions.

In trespass it is confined to two classes of cases, where, first,



it is done to the inheritance, which constitutes waste, which lies at the foundation of the doctrine; and, secondly, where the injury, without regard to the character of the article injured, is of such a character that it can not be compensated by money. Under the last head comes the case of the insolvency of the trespasser.

We repeat that injunction to restrain a trespass is confined to cases including injury to the freehold or inheritance, and to such cases as the circumstances exclude the possibility of compensation in damages to be awarded by the judgment of a court of law.

Now, does the alleged injury in this case come within the category?

It is true that injury to a mine has been held in England sufficient to warrant the intervention of an injunction, but an examination of the cases cited in the note to nine hundred and twenty-ninth section of Story, and also of *Livingston v. Livingston*, 6 Johns. Ch. 497, will show that this rests, not upon the ground of irreparable injury, but upon the ground that it is an injury to the inheritance, which, if done by a privy in estate, would have constituted waste.

But in the case at bar, the trespass is no injury to the inheritance or freehold, for whilst the plaintiff claims the ownership of the soil, he informs us that the title to the minerals upon which the trespass is committed belongs to the State of California, and that he is only using them by a license from the State. He had just as well ask an injunction to prevent further injury to hired cattle that happened to be upon the land of the plaintiff.

Nor is this injury of such a character as to prevent an efficacious compensation by a judgment for damages in a court of law. To this conclusion we should necessarily come by any system of *a priori* reasoning, but for this we have the highest authority—the decision of this court in the case of *Gates v. Teague*, where this court uses the following language: “Depriving the plaintiffs of a large amount of gold-bearing earth is a loss, but not irremediable in the sense which will entitle them to the relief they seek.”

But again the bill shows that the defendants are not only trespassers, but trespassing under a claim of adverse title.

“I remember being told from the Bench, very early in my

life," says Lord BACON, "that if the plaintiff filed a bill for an account, and an injunction to stay waste, stating that the plaintiff claimed by a title adverse to his, he stated himself out of court as to the injunction": See *Pillesworth v. Hop-ton*, 6 Vesey, 51.

COOK & FENNER and BOORAEM, for respondents.

BURNETT, J., delivered the opinion of the court, TERRY, J., concurring.

The questions arising in this case are of the greatest importance, and may be stated thus:

The order granting the injunction was made upon the facts stated in the complaint, which must be taken as true, for the purpose of determining the points raised on appeal.

1. Can a party in possession of a mining claim on public land within this State, sustain a suit to determine the adverse title of a party out of possession?

2. And if so, can the plaintiff obtain an injunction pending the litigation, to prevent the removal of the minerals, in the same manner as if he were the true owner of the soil?

In reference to the first point, the two hundred and fifty-fourth section of the Practice Act provides that "an action may be brought by any person in possession of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest."

The language of this section is general and comprehensive, and allows any person "in possession" to bring the action against any person "who claims" an estate or "interest" adverse to him. The only title the plaintiff is required to have, is that which flows *prima facie* from possession. It has been repeatedly decided by this court that possession was *prima facie* evidence of title: 4 Cal. 70, 94; 5 Cal. 40. This provision of the statute is founded upon evident reasons of justice and policy, and is more especially applicable to the present condition of the country. It is evident that both parties, if honest, have an equal interest in knowing the true state of their respective claims at the earliest practicable period, and each party has his appropriate remedy provided by law. The party out of possession can bring his suit to obtain possession

of the property, and the party in possession can bring his action to determine the adverse title. The law, by giving both parties the right to sue, affords each the power of protection against the other, and thus secures a speedy determination of the doubt, the end intended to be accomplished by the law itself. If the holder of the adverse claim, out of possession, should delay bringing his suit, the party in possession can force him to produce his claim, and submit it to the determination of the proper tribunal. If a suit be necessary to settle the dispute at all, the sooner it is brought the better for both parties.

But the beneficial effects of this provision are as applicable to mining claims as to any other cases. The value of these claims, especially of those containing quartz lodes, is immense and the titles often conflicting. To work these quartz mines efficiently, a very heavy outlay of capital in the erection of machinery is required. As an illustration, it is stated in the complaint in this case, that more than eight hundred thousand dollars had been expended by the plaintiffs. It is, then, of the utmost importance that parties engaging in these extensive and beneficial enterprises, should have some means of determining all adverse claims before they make their costly improvements. If this right is not extended to mining claims, then this most important interest of the State is without adequate protection, and there is a manifest failure of justice.

If, then, it be conceded that a party in possession of a mining claim can sustain an action to determine an adverse outstanding claim, can he not obtain an injunction to protect the property pending the litigation? Is not an injunction *pendente lite* a remedial favorite in equity, and especially so, when asked by a party in the actual possession of a mine against a party out of possession?

That the plaintiffs could obtain this injunction had they the title in fee simple, there would seem to be no doubt. It is true that courts of equity were once reluctant in granting an injunction to prevent a mere trespass. At first the remedy was confined to cases of technical waste, when privity of title existed between the parties. The history of this change is concisely stated by Lord ELDON, in his opinion delivered in the case of *Thomas v. Oakley*, 18 Ves. Jr. 184: "Through-

out Lord HARDWICKE's time and down to that of Lord THURLOW, the distinction between waste and trespass was acknowledged, and I have frequently alluded to the case upon which Lord THURLOW first hesitated: A person having a close demised to him began to get coal there, but continued to work under the contiguous close belonging to another person, and it was held that the former, as waste, would be restrained; but as to the close not demised to him, it was a mere trespass, and the court did not interfere. But I take it that Lord THURLOW changed his opinion upon that, holding that if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which, in equity, he was entitled. The interference of the court is to prevent your removing that which is his estate. Upon that principle, Lord THURLOW granted the injunction as to both. That has since been repeatedly followed, and whether it was trespass under the color of another's right actually existing or not. If this protection would be granted in the case of timber, coal, or lead ore, why is it not equally to be applied to a quarry? The comparative value can not be considered."

This distinction between waste and trespass, so far as regards the power of the court to grant an injunction, has been set aside, and, "it is now 'granted,'" says Mr. Justice STOKY, "in all cases of timber, coals, ores and quarries, when the party is a mere trespasser, or when he exceeds the limited rights with which he is clothed, upon the ground that the acts are, or may be, an irreparable damage to the particular species of property." The same hesitation was once manifested by the courts in restraining the publication of private letters except those on business. "Fortunately for public, as well as private peace and morals," says the same author, "the learned doubts on this subject have been overruled, and it is now held that there is no distinction between private letters of one nature and private letters of another."

In reference to the subject of injunctions, the same writer after stating that they "are now more liberally granted than in former times," makes these practical and judicious remarks: "It may be remarked, in conclusion, upon the subject of special injunctions, that courts of equity constantly decline to lay down any rule which shall limit their power and discre-

tion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course; for it is impossible to foresee all the exigencies of society, which may require their aid and assistance, to protect rights and redress wrongs. The jurisdiction of these courts, thus operating by way of special injunction, is manifestly indispensable for the purpose of social justice in a great variety of cases, and therefore should be upheld by a steady confidence." Story's Eq. Jur., Secs. 863, 929, 948 and 956b.

The ground upon which the injunction was granted in these cases of timber, coals, ores, and quarries, was that of trespasser, in the language of Lord ELDON, was "taking away the very substance of the estate." If a party enter upon the premises of another and occupy them for the purposes of husbandry, and cultivate them in a proper manner, so as not materially to diminish the value, when they shall afterward come into the possession of the rightful owner, the courts will not grant an injunction to restrain the party in possession, pending the litigation, for this would be of no benefit to the owner and might be an injury to both parties. But when the alleged trespasser is taking away that which can not be replaced, and which constitutes the substance of the mine itself, so as to diminish its value when restored to the owner, it constitutes a very different case.

It must be conceded that the principles of these cases apply to gold mines, as well as to others. In fact there are circumstances connected with gold mines that render the remedy by injunction more appropriate than to other mines. The only value of a gold-mining claim, in most cases, consists in the mineral. For timber, for cultivation, and for other purposes, they are generally valueless. If a party removes the gold, he removes all that is of any value in the estate itself. It is emphatically taking away the entire substance of the estate. Another material circumstance is the impossibility of making any certain estimate of the amount of injury done. In the case of a coal mine, or stone quarry, the amount removed can be substantially ascertained by admeasurement. So in the case of timber trees, their size, number and value, can be substantially ascertained. But in reference to gold mines this is not the case. There is no mode of estimation that even approaches

to substantial accuracy, and hence the greater necessity for preventing that injury which you can not estimate, and, therefore, can not compensate adequately.

In the case of *Gates v. Teague*, October Term, 1856, this court held that the mere allegation that the injury was irreparable would not in itself be sufficient, but the complaint must show how. The same is stated as the rule in the case of *Amelung and others v. Seekamp*, 9 Gill & John. 474. This is, no doubt, the correct rule, and facts must be stated to justify the conclusion of irreparable injury. But in the cases of mines, timber and quarries, the statement of injury is sufficient. In the nature of the case, all the party could well state, as matter of fact, is the destruction of the timber in the one case and the taking away the minerals in the other. Taking away the minerals is itself the injury that is irreparable, because it is taking away the substance of the estate. The allegation of insolvency is not necessary to prove the injunction in these cases. The right to the remedy is based upon the nature of the injury, and not upon the incapacity of the party to respond in damages. And in reference to the element of insolvency, it may be remarked that the rule established under a system which permitted imprisonment for debt, and therefore gave more efficiency to the remedy at law, should be received with some modifications under our system. The reason of the rule being modified, the rule itself should receive a corresponding qualification; and in practice it is generally difficult to prove insolvency, except after the return of an officer upon execution. To rely upon the personal responsibility of an individual for compensation for serious injuries, is what practical men would hesitate to do, when they can avoid it. And I agree with Chancellor Johnson, in the case of *Kinsler v. Clarke*, 2 Hill, (S. C.) Eq. 618, that it comports "more with substantial justice to both parties to restrain the trespass, than to leave the plaintiff to pursue his remedy at law."

The complaint in this case alleges that the defendants committed the acts charged under an invalid or adverse claim. This statement under the English decisions at one time would have been fatal to the case. But the rule then has been since changed. In the case of *Smith v. Collyer*, 8 Ves. Jr.

90, Lord ELDON said: "I remember when, if a plaintiff stated that a defendant claimed by an adverse title, he stated himself out of court." Again, in the case of *Norway v. Rowe*, 19 Ves. Jr. 154, the same Chancellor said: "I recollect hearing from either Lord THURLOW or Lord BATHURST, that if a bill contained a passage, which is frequently inserted now, that the defendant pretends the plaintiff is not entitled to the estate, he stated himself out of court."

But it seems to be the general rule in England that if the answer positively denies the exclusive right of the plaintiff, then the injunction will be dissolved. This is based upon the practice of not permitting affidavits to be read to contradict the answer as to the question of title: 8 Ves. Jr. 89; 9 Ves. Jr. 355. In reference to other questions, they may be read. As the denial of the defendant is under oath, and the plaintiff is not allowed to contradict the answer, of course the injunction must be dissolved. Still this rule is not inflexible: 7 Ves. Jr. 305, and notes. In the case of *Livingston v. Livingston*, 6 John. Ch. 497, Chancellor KENT said: "This case is analogous to a case before Lord CAMDEN, referred to by the counsel in *Mogg v. Mogg*, 1 Mer. 654, and which Lord THURLOW seemed to approve of. It was when a defendant claimed the right of *estovers*, and, under that right, cut down timber; there was a claim of right, and until it was determined, it was proper to stay the party from doing an act which, if it turned out he had no right to do, would be irreparable. So, also, in *Hanson v. Gardiner*, 7 Ves. Jr. 305, the injunction was granted when the defendant claimed common of pastures and *estovers*." In the case of *Amelung and others v. Seekamp*, 9 Gill & J. 468, it was held that an injunction would not be granted to restrain trespass pending proceedings to try the right, except in cases of irreparable mischief, or to prevent a multiplicity of suits, or when peculiar circumstances imperatively demanded such a remedy. The same rule seems to prevail in South Carolina: 2 Hill, Ch. 618. In this case Chancellor JOHNSON said: "Injunctions to restrain trespass, where irreparable mischief would be effected before a trial at law could be had, are now regarded with more favor."

It is not, however, necessary in this case to lay down any rule as to the proper course to be taken upon the coming in

of the answer containing a positive denial of the plaintiff's exclusive right. There is no distinction between the effect of an allegation in the complaint that the acts were committed under pretense of an adverse title, and the sworn statement in the answer. A man may pretend to claim what he would not solemnly set up in the answer.

The allegation in the complaint that the defendants justified under an adverse claim, will not in any sense prejudice the right to the injunction.

Conceding, then, for the sake of the argument, that the plaintiffs have shown themselves the owners of the premises described in the complaint, there could be no reasonable doubt as to their right to the injunction. The case comes substantially within the rule laid down by Chancellor KENT, in *Livingston v. Livingston*, that "there must be something particular in the case, so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or when the value of the inheritance is put in jeopardy." The particular circumstance of this case is, that the injury consists in removing the minerals from a gold mine, thus taking away the very substance of the estate. It is not, if the complaint be true, an ordinary and naked trespass. Another circumstance which ought to have some effect, is the fact that the action is brought to quiet the possession, and the injunction was granted "*pendente lite*."

If these views be correct, it then becomes important to inquire what protection the law gives to parties holding mining claims upon the public lands within this State. This inquiry will involve the examination of the various decisions of this court in reference to this subject.

In the case of *Hicks v. Bell*, 3 Cal. 219, this court decided that "in reference to the ownership of public lands, the United States only occupied the position of any private proprietor, with the exception of an express exemption from State taxation. The mines of gold and silver on the public lands are as much the property of this State, by virtue of her sovereignty, as are similar mines in the lands of private citizens. She has, therefore, the sole right to authorize them to be worked; to pass laws for their regulation; to license miners, and to affix such terms and conditions as she may deem prop-

er to the freedom of their use." The doctrines of this case are expressly affirmed in the subsequent case of *Stoakes v. Barrett*, 5 Cal. 39. In the case of *McClintock v. Bryden*, 5 Cal. 97, it was held, "that the act of April 13, 1850, passed for the better regulation of the mines, and the government of foreign miners, seems to give, by necessary implication, whatever right the State might have in the mineral in the soil, and the right to mine to all native born or naturalized citizens of the United States, who may wish to toil in the gold placers." The six hundred and twenty-first section of the Practice Act would seem to imply the same right.

In the case of *Irwin v. Phillips and others*, 5 Cal. 146, Mr. Justice HEYDENFELDT, in delivering the opinion of the court, uses this language:

"Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown, either by the United States or the State Government; and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other." In this case the doctrine of the common law, which prescribes that a watercourse must be allowed to flow in its natural channel, was held to be inapplicable to our mineral region, and that therefore a party had a right to divert the waters of a stream from their natural channel, for mining purposes. So, in the case of *Tartar v. The Spring Creek Water and Mining Company*, 5 Cal. 395, the court held this language: "The current of the decisions of this court go to establish that the policy of this State, as derived from her legislation, is to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner." And finally, in the case of *Hoffman v. Stone*, 7 Cal. 46, this court used this language: "The former decisions of

this court in cases involving the right of parties to appropriate waters for mining and other purposes, have been based upon the wants of the community and the peculiar condition of things in this State (for which there is no precedent) rather than any absolute law governing such cases. The absence of legislation on this subject has devolved on the courts the necessity of framing rules for the protection of this great interest, and in determining these questions we have conformed, as nearly as possible, to the analogies of the common law."

The sentiment that "courts are bound to take notice of the political and social condition of the country which they judicially rule," is as just as its expression is concise and appropriate. And courts knowing the political and social condition of the country, are equally bound to apply the rules of law and the principles of enlarged reason to the new circumstances of a people.

It is the boast of the common law, as of every other system of enlightened jurisprudence, that its principles, when legitimately applied, will afford a redress for every substantial injury. And especially is it the distinguishing characteristic of equity that, while its rules are certain, its expansive principles are ample enough to embrace all new cases. The circumstances of a case may be new, but there is always some known principle, or a new combination of known principles, applicable to it. Law, in fact, is but the rules of common sense, and the principles of justice, as applied to circumstances as they really exist. And it is upon this sensible ground that courts of equity have wisely refused to lay down any limits to their right to grant special injunctions. The right must be exercised with due caution, but it must be exercised in proper cases.

Under the novel state of things existing in this country, great interests have grown up, and have been fostered and protected. Large amounts of capital and labor have been expended in improvements upon mining claims in every part of the mining region. And whatever may be the comparative value of different claims, the *bona fide* possessor has an equal right to protection. Under the current of decisions of this court, conflicting claims to the use of water, as well as to the possession

of mining claims, may be settled. The party has rights that the law will protect; and if the law protects him at all, it should give him efficient practical protection. Any other protection might fail to attain the very end intended.

If it be true that the minerals found in a mining claim, as a general thing, constitute its only value—that by the current of legislation, both of the Federal and State governments, the holder is there by the license of both governments, and that under this comprehensive license he is allowed and even encouraged, to take from the premises all that is of any value, then it would seem to follow, as a necessary and inevitable result, that the party thus in possession could sustain any and all remedies necessary to protect the property for the time being. So long as the real owner permits him to occupy the premises and extract the minerals, not as a wanton trespasser, but as a favored and licensed possessor, so long he has the right to rely upon the title of the superior under whom he holds, and to resort to any remedy the government could maintain against a wrongdoer.

It is true, that while the acts of Congress specially reserve these mineral lands from the right of pre-emption, and the acts of the State legislature contain various provisions regulating the mines, neither the one nor the other have conferred in express terms, any specific title upon the holder of a mining claim. Yet these acts, especially those of the State, have virtually assumed the right to exist; otherwise there could have been no rational basis upon which this legislation could be predicated. When we consider the current and the spirit of the legislation of both governments, taken in connection with the history and the known circumstances of the country, the conclusion is irresistible that the mines are occupied and worked with the clear assent and encouragement of both governments. And while the terms of this license, and the relation which the miner sustains to the superior proprietor, may not be expressly laid down, and the duration of the estate not clearly designated by any positive law, and we may not, for these reasons, be able to give any exact definition of the precise nature of the right, yet one thing is well understood and indisputable; they are there by the clear license of both governments, and have such a title as will hardly be divested,

even by the act of the superior proprietor. There are equitable circumstances connected with these mining claims that are clearly binding upon the conscience of the governmental proprietor, that this court must, with all due respect, presume will never be disregarded. Rights have become vested in virtue of this license, that can not be divested without a violation of the principles of justice and reason: *Conger v. Weaver*, 6 Cal. 548.

If these views be correct, the owner of a mining claim has, in practical effect, a good vested title to the property, and should be so treated, until his title is divested by the exercise of the higher right of the superior proprietor. His rights and remedies, in the meantime, are not trammelled by the consideration that the higher right to reclaim the property exists in another, which right may possibly, but will not probably, be exercised. His right to protect the property for the time being, under the peculiar circumstances of the case, is as full and perfect as if he was the tenant of the superior proprietor for years or for life.

If a party leases from another a tract of land for agricultural purposes, upon which there is a mine, any irreparable injury to the mine would not affect his estate, but the injury would be to the estate of the landlord, and the remedy, in respect to that injury, must be sought by the latter. But where the lease is of a mine, the case is entirely different. The injury, in that case, is to the estate of the tenant, and he is the proper party to sue.

Of the right of the tenant to sustain an injunction, pending a suit to settle the title in such a case, there would seem to be no doubt, provided the title of his landlord itself be sufficient. A tenancy is but a smaller estate, carved out of a greater. It is shorter in duration, but equally exclusive, while it lasts. All the rights that belong to the larger estate are incident to the tenancy for the term, except such as are reserved, from the nature of the case, or by the express terms of the lease. If, therefore, the estate of the tenant suffers irreparable injury, the right to restrain it would seem to be as clear as the right to sustain ejectment or trespass, under proper circumstances.

And in reference to a mining claim, under the circum-

stances actually existing in this State, the injury to the mine is, to all intents and purposes, an irreparable injury to the estate of the holder. Unless restrained, the intruder may take away not only that which is of the substance of the existing estate, but all that is of any value. The right of the holder, whatever you may define it to be, is practically valuable, if protected "against all the world but the true owner." It would seem to be the duty of the courts to give this protection.

It must be conceded that courts should exercise due discretion in granting injunctions to restrain alleged irreparable mischiefs. Parties are sometimes improperly restrained, to their serious injury. When the title of the plaintiff is disputed in the answer, the courts should be still more cautious. But in all cases it is matter of sound discretion. It may be properly said, however, that when there is reasonable ground to apprehend the commission of irreparable mischief, pending the litigation, and the title be matter of doubt, the courts should restrain both the parties, or appoint a receiver, under proper circumstances. The party restrained, in a case of reasonable doubt, has, at least, these advantages: First, the property is left untouched for the time, and, upon the termination of the suit in his favor, returns to him unimpaired. Second, he has not only his remedy against the opposite party, but also against his sureties. But in case the party is not restrained, and the suit should terminate adversely to him, the other party must rely solely upon his personal responsibility. It is true, notwithstanding all these advantages, he may suffer very seriously; but as it is matter of doubt who has the right, and some one must incur the risk pending the litigation, the risk would be less on his than on the other side.

Whether the right to the minerals in the soil of California be in the State or in the United States (and in reference to which it is unnecessary to express any opinion), the right of the plaintiffs to the injunction would be equally clear. What their rights would be upon the coming in of the answer does not arise in this case. This opinion is solely predicated upon the facts stated in the complaint.

For these reasons I think the order granting the injunction was correct and that the judgment should be affirmed.

MURRAY, C. J.

This appeal is prosecuted from an order of the court below, granting an injunction. The plaintiffs allege that they are the owners of certain premises described in the bill; that they entered upon and took possession of the same for the purpose of working the gold-bearing quartz and other precious metal therein contained; that the defendants have intruded upon their possession, under a claim of title to the soil which they allege is unfounded and void, and are working said quartz claims, and threatening to carry away the gold-bearing earth and quartz, and to deprive the plaintiffs of their premises.

The bill alleges irreparable injury, and prays an injunction until the rights of the parties can be ascertained and determined.

Under the old practice, courts of equity seldom or never interfered to prevent trespass, but the rule has been relaxed by modern decisions, and is thus stated by Story, in his Commentaries on Equity Jurisprudence: "Formerly, indeed, courts of equity were extremely reluctant to interfere even in cases of repeated trespasses, but now there is not the slightest hesitation, if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in the future. Thus, for instance, where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted, because it operates a permanent injury to the property."

Among other cases relied on to support this doctrine the learned commentator refers to that of *Livingston v. Livingston*, 6 Johns. Ch. 497, in which Chancellor Kent thus sums up the rule: "The recent case of *Garstin v. Asplin*, 1 Madd. Ch. 150, shows that it is not the general rule that an injunction will lie in a marked case of trespass, where there is no privity of title, and where there is a legal remedy for the intrusion; there must be something particular in the case, so as to bring the injury under the head of quieting the possession, or to make out a case of irreparable mischief, or, where the value of the inheritance is put in jeopardy."

The counsel for the plaintiffs doubtless had this authority in his mind at the time he instituted this suit, which seems

to be of a double character, as a bill of peace, and to restrain a threatened trespass, and if he had simply counted on title to the land he might have maintained it. The rule, however, is that the pleading must be taken most strongly against the pleader. The bill first alleges that the plaintiffs are the owners of certain land, describing it, and then goes on to state they entered upon and took possession of the premises, consisting of quartz leads, etc., for the purpose of working the same; that the gold belonged to the State, and that they were there by virtue of a general license of the State to work said minerals.

It is evident from the whole bill that the plaintiffs do not count on their ownership of the soil and proprietary right to the minerals as appurtenant thereto, for if they were owners, then, under our previous decisions, without some specific legislation on the subject, no one would have a right to intrude upon their premises for the purpose of mining. They seem to rely entirely on their prior location and appropriation of the quartz veins in controversy.

The injury complained of not being to the inheritance, in order to sustain this injunction, must be shown to be irreparable. The bill does not allege the insolvency of the defendants, nor any fact or circumstance tending to establish that such is the case, except so far as we would be bound to infer from the nature of the matters involved, that it would probably be impossible to ascertain the amount of damages sustained by the defendant.

It is true that it might be somewhat difficult to fix any correct standard by which the plaintiffs' damages could be ascertained, but it is no less true that the rule would be equally uncertain and unsatisfactory if the plaintiffs should be cast in this action. The fact that the controversy involves quartz veins, or gold-bearing earth, is not sufficient in itself to warrant this court in assuming that the injury complained of must necessarily be irreparable. The plaintiff ought to have brought himself within the rule of *Livingston v. Livingston*, before quoted.

The questions involved in this suit have been substantially settled in the case of *Gates v. Teague et al.*, October Term, 1856, in which this court uses the following language: "True,

it is said that the injury will be irreparable, but it does not show how; depriving the complainants of a large amount of gold-bearing earth is a loss, but not irremediable in the sense which will entitle them to the relief which they seek."

I am satisfied, upon an examination of the plaintiffs' bill, that the case made by it did not warrant the issuing of the injunction. This, I think, is the only question involved. I am compelled, therefore, upon my understanding of the case, to dissent from the majority opinion of the court. I think the order granting the injunction should be reversed.¹

COKER ET AL. V. SIMPSON ET AL.

(7 California, 340. Supreme Court, 1857.)

Facts sufficient to justify damages only, without injunction. The complaint stated that the defendants had constructed a mining ditch above that of plaintiffs, and had thereby diverted the waters of the stream which supplied them without any allegation of continuing injury; and claimed damages and a perpetual injunction: *Held*, that the case stated was sufficient to support an action for damages, but not to sustain the injunction.

There must be equitable circumstances stated, to obtain a remedy by injunction.

Appeal from the District Court of the Fourteenth Judicial District, County of Nevada.

This was an action for damages sustained by plaintiffs, as owners of a mining ditch, by the construction of another ditch above it by the defendants, thereby diverting the waters of the stream supplying both ditches. The complaint avers the diversion of the water, alleges the injury and prays for judgment for damages and for a perpetual injunction against the defendants. There is no allegation in the complaint that the injury is continued or is threatened or likely to be so. Defendants answered. The court below gave

¹ The opinions of the majority of the court maintaining the injunction in this case have been repeatedly followed, approved or affirmed: *More v. Massini*, 7 M. R. 455; *U. S. v. Parrott*, 7 M. R. 336; *Hess v. Winder*, 34 Cal. 272; *Blasdel v. Williams*, 9 Nev. 172; *Boggs v. Merced Co.*, 14 Cal. 313; *Post Mex. Grant*; *Chapman v. Toy Long*, 1 M. R. 503; *Partridge v. McKinney*, 1 M. R. 187; *Tuolumne Co. v. Chapman*, 8 Cal. 397; *Post NUISANCE*.

judgment for plaintiffs for damages and granted a decree for a perpetual injunction.

Defendants appealed.

HENRY MEREDITH, for appellants.

The judgment in this case is erroneous and should be reversed, so far as the same grants a perpetual injunction against defendants.

The complaint is merely a common law declaration for damages for the diversion of water, and is devoid of averments of any and all the equities entitling a party to an injunction: 4 Hen. & M. 424; 1 A. K. Marsh. 554; 6 John. Ch. 46; *Gates v. Teague*, Oct. Term, 1856.

McCONNELL, for respondents.

No brief on file.

BURNETT, J., delivered the opinion of the court, MURRAY, C. J., concurring.

The decision of this case must be made upon the complaint, the answer and the judgment of the district court, as no point is made requiring the transcript to contain the evidence. The plaintiffs were the owners of a ditch leading from Shady creek, and after the construction of their ditch the defendants constructed a ditch above that of plaintiffs and diverted the waters of the stream. The complaint, in the stating and charging portion of it simply alleges the facts sufficient to constitute a good cause of action for damages for the diversion, and then prays judgment for damages and a perpetual injunction. A verdict was found for plaintiffs and judgment given for damages and perpetual injunction, and defendants appealed.

The only grounds of error assigned are, first, that the complaint contained no sufficient allegations to sustain the injunction, being only a case for damages; second, that the injunction granted went beyond the prayer of the complaint and the justice of the case.

The complaint seems insufficient to sustain that part of the

judgment of the court granting the injunction. It is simply alleged, in substance, that defendants, between certain specified times, diverted the waters of the stream, to the plaintiffs' damage, in a sum stated. There is no allegation that the injury was continuing or threatened to be continued or likely to be continued. The circumstances stated are sufficient for a recovery of damages but no equitable facts are alleged to sustain the injunction. The writ of injunction, though remedial, must be based upon equitable circumstances. From all that appears in the complaint the injury was only temporary and not likely to continue.

For these reasons I think that part of the judgment of the court below, granting a perpetual injunction, should be reversed. It is not necessary to examine the other ground of error assigned.

Reversed.

FREMONT V. THE MERCED MINING CO.

(1 McAllister, 267. U. S. Circuit Court, District of California, 1858.)

Plea to jurisdiction. When the want of jurisdiction is not patent on the record, the proper mode to take advantage of it is by plea.

¹ **Injunction pending trial of plea to jurisdiction.** The plea to the jurisdiction does not oust the jurisdiction of the court; in a case of threatened irreparable mischief the court will issue an injunction to stay the mischief pending the argument or issue, and accelerate the hearing or argument upon the issue made.

Form of finding and decree upon the issue of citizenship submitted to a jury.

The bill in this case was filed to enjoin the working of a gold mine.

A plea to the jurisdiction was filed, and motion for injunction was met by the objection that the court had no jurisdiction.

Argument of plea ordered forthwith, and the issue of fact given to the jury.

¹ Federal court will not enjoin where the same prayer has already been made to State court: *Evans v. Smith*, 3 West Coast R. 213.

McALLISTER, J.

The bill in this case was filed to enjoin the excavation of gold from land alleged to be the property of the complainant. The bill was met by defendants with a plea to the jurisdiction of the court, on the ground that the complainant was not a citizen of the State of New York, as alleged in the bill, but was a citizen of California at the time; and that therefore the complainant could not sue the defendant, who is also a citizen of this State, in this court. A motion was then made on behalf of the complainant for the issue of an injunction, which was resisted upon the ground that pending the plea to the jurisdiction, the court could take no further proceeding in the cause. To enjoin an alleged irreparable mischief is the object of the present proceeding. No defect of jurisdiction appearing on the record, the proper mode to avail of it is by plea. It is contended, however, that the filing of the plea has the effect of arresting all further proceedings in this court, and that it can make no order in regard to the injunction until the plea is disposed of. That the court can not grant a perpetual injunction or hear an argument upon it, is evident. It will direct an immediate argument of the plea; and in a case of irreparable mischief alleged and not denied, it can issue a temporary injunction to stay the mischief until the obstacle interposed by the defendant's plea shall be removed. It can not be that, assuming the fact averred in the plea may be true, the court must remain passive and permit the mischief to be wrought, because its jurisdiction has been questioned?

The case is simply this: The complainant in his bill has made the proper averments of citizenship to give jurisdiction to the court. So far, then, as the record is concerned, the jurisdiction of the court is perfect. The effect of such averments is to impart, *prima facie*, jurisdiction; and it is incumbent on the defendant who would impeach that jurisdiction for causes *dehors* the record, to do so not only by allegation but proof. Until this be done, the *prima facie* jurisdiction derived from the record authorizes the court to retain the suit in such position as to enable it to preserve the rights of the respective parties *in statu quo* until the intervening obstacle to a decision

on the merits is disposed of. An immediate opportunity will be afforded to the parties, the one to sustain, the other to falsify it. The issue, arising as it does in an equity suit, might be tried by the court. Such seems to have been the course pursued in the case of *Shelton v. Tiffin and others*, 6 Howard, 163. But as it is within the power of the court to inform its conscience by the verdict of a jury, the facts establishing the citizenship of plaintiff either in New York or this State, will be referred to a jury. Various cases have been cited; all, however, were common injunctions in which pleas or demurrers were filed. Even in such the court have always speeded the trial of the issue raised by the demurrer or plea, in order to promptly reach the injunction.

In an anonymous case (2 Atk. 113) it is said, "Where defendant has put in his plea to plaintiff's bill, the plaintiff can not move for an injunction to stay defendant from proceeding at law till the plea, by some means or other, is removed out of the way; all that the plaintiff can do is to move that the plea may be accelerated, which the court did."

In *Cousins v. Smith*, 13 Vesey, 166, Lord ERSKINE plainly indicates he would have removed a *demurrer*, under similar circumstances, by ordering it to be argued immediately.

In *Humphreys v. Humphreys*, 3 P. Wms. 395, the court said, upon motion of an injunction to stay, etc., after a plea put in, there can be no motion for an injunction; but, at the instance of the plaintiff it was ordered that the plea should come on for argument the next day, and if overruled the plaintiff might move at the same time for an injunction.

If, therefore, a motion shall be made by the plaintiff to accelerate the removal of the plea, the court will direct the immediate trial of the issue raised by it. If no immediate disposition of it can be made, it will issue such order as will maintain the parties *in statu quo* until such is made.

HALL McALLISTER, solicitor for complainant.

COOK & FENNER, for defendants.

The issue of citizenship was submitted to a jury, who having returned a verdict in favor of the plaintiff, the following order was placed upon the minutes of the court:—

UNITED STATES OF AMERICA V. PARROTT. 335

John C. Fremont }
v. }
Merced Mining Co. and others. }

Whereas, heretofore, a trial was had in above action in this court, on the law side thereof, before a jury impaneled for said trial, on the 14th, 15th, 16th and 17th days of June, 1858, upon the following issue: Whether John Charles Fremont was at the commencement of this action, viz., on the 8th day of May, 1858, a citizen of the State of California?

And, whereas, the plaintiff and defendants appeared by their respective counsel, and evidence was adduced by both parties in reference to said issue at said trial; and, whereas, the said issue was duly submitted to the jury so impaneled as aforesaid, and thereafter said jury did render a verdict in the words and figures following, namely:

"The jury in this case unanimously agree that John Charles Fremont was not, at the commencement of this suit, on the 8th May, 1858, a citizen of the State of California."

"San Francisco, June 17, 1858."

Now, I do hereby certify that said verdict was found as aforesaid; and I further certify it is satisfactory to me.

M. HALL MCALLISTER,

Circuit Judge, Circuit Court, U. S., for Dist. Calif.
San Francisco, June 18, 1858.

¹THE UNITED STATES OF AMERICA V. PARROTT ET AL.

(McAllister, 271. U. S. Circuit Court Northern District of California, 1858.)

²**Chancery practice—Affidavits.** Upon motion for injunction complainant may read affidavits filed before the coming in of the answer; and after answer filed he may read further affidavits as to matters of waste and other collateral facts, but not on the question of title.

¹ The same case is reported, McAll. 447, on motion for commission to take testimony, and on that point only.

² Sworn answer treated as an affidavit, *Hiller v. Collins*, 63 Cal. 235.

Necessary parties—Non-residents. The general rule in a court of equity is that all persons interested in the object of the bill are necessary and proper parties. There are exceptions to the rule as, *e. g.*, parties not within the jurisdiction; and where such parties are not indispensable the bill will be retained.

Averments in avoidance. On motion to dissolve the court will consider matters set up in the bill by way of avoidance as if stated by affidavit.

Jurisdiction of U. S. courts in chancery. The jurisdiction of the circuit courts of the United States is limited to certain persons and subjects; but within those limits it is complete and full; and in giving the relief prayed for it has all the powers of the English High Court of Chancery.

Title to mine disputed. An injunction may issue to stay the working of a mine although the legal title is in controversy, the object being to preserve the subject-matter of the litigation.

¹ Denying the equities of the bill. Where the answer denies directly and positively, upon personal knowledge, the allegations of the bill, it is a denial of the equity, and acting upon such answer as evidence an injunction ought to be dissolved in the absence of extraordinary circumstances, such as waste, destruction, trespasses, etc.; but where fraud, forgery and antedating are distinctly charged in the bill, the denial of such charges upon information and belief is not a denial of the equity of the bill and can not defeat the motion for injunction or cause the dissolution of one already granted.

Trespass on mine—Irreparable injury. Working a mine belongs to the class of irreparable injuries; taking away the minerals is taking away the substance of the estate.

Insolvency. The allegation of insolvency is not necessary to procure the injunction in these cases; it is an element to be considered in connection with the amounts involved, and, where it exists, is a proper subject for allegation in the bill.

Title of the U. S. in minerals. Under the treaty of Guadalupe Hidalgo, the United States acquired title to the minerals, and they have not dedicated them to the public.

The institution of a suit at law to try title, is not indispensable to the jurisdiction in equity to protect the property.

Ore already severed. The removal of the fruits of past waste may be enjoined.

The bill in this case is filed for an injunction, and the appointment of a receiver. The object is to restrain the working of a quicksilver mine, known as the "New Almaden," of the alleged value of \$25,000,000, and from which defendants are extracting minerals to the annual value of \$1,000,000. It alleges that the title under which defendants claim to hold possession is derived from the Mexican government, and that the same, independently of all other defects, is forged and antedated. That defendants have, through one Andres Cas-

¹ *Moore v. Ferrell*, 7 M. R. 282; *Hiller v. Collins*, 63 Cal. 235.

tillero, in their own behalf, petitioned the board of land commissioners, organized under the act of Congress of March 3, 1851, for a confirmation of their claim, which application is now pending on appeal before the District Court of the United States for the Northern District of California. The bill prays for an injunction to enjoin the destruction of the mine until the title to it is determined by the tribunals to which its adjudication is finally confided.

P. DELLA TORRE, district attorney.

EDMUND RANDOLPH and E. H. STANTON, for the United States.

A. C. PEACHEY and GREGORY YALE, for defendants.

McALLISTER, J.

The magnitude of the interests involved, the novelty of this case in some of its features, the fact that the documentary title on which the defendants to a certain extent rely, was obtained from Mexico pending the war between that country and this, a few weeks prior to the occupation of this country by the American forces, the allegation that such documentary title was procured by a conspiracy to defraud the United States and was forged and antedated,—are circumstances which have invested this case with no ordinary interest outside these walls. That interest has been reflected upon those who have appeared in court as the representatives of the respective parties, as evidenced by the strenuous and zealous efforts which have been made by the respective counsel. This court is reminded by this condition of things of the remarks of Chief Justice Marshall, in *Mitchel and others v. The United States*, 9 Peters, 723: "Though the hope of deciding causes to the mutual satisfaction of parties would be chimerical, that of convincing them that the case has been fully and fairly considered, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case, may be sometimes indulged. Even this is not always attainable. In the excitement pro-

duced by ardent controversy, gentlemen view the same object through such different *media* that minds not infrequently receive therefrom precisely opposite impressions. The court, however, must see with its own eyes, and exercise its own judgment, guided by its own reason."

The present proceeding may be viewed as in the nature of an information on the part of the government through its law officer. It is a bill filed by the district attorney of the United States in their behalf. It sets out the title of the United States to certain premises; that defendants are in possession of said premises, which consists of a mine of vast value, and are extracting its minerals to an amount in value of \$1,000,000 per annum, and have abstracted already miners' to the amount of \$8,000,000. It charges their possession to be tortious, and that the title under which defendants hold such possession was forged, false, antedated and fabricated in pursuance of a conspiracy formed to cheat and defraud the United States of their rights to the said property; that defendants have filed a petition in the name of one Andres Castillero to the board of land commissioners under the act of Congress passed 3d March, 1851, which is pending on appeal before the District Court of the United States for the Northern District of California, the object of which petition is to obtain from the United States a confirmation of the title which they pretend to hold from the Mexican government. It further alleges that defendants are destroying the substance of the mine, that they are unable to respond for the damages which have already accrued and still may accrue, and prays that an injunction may issue to stay the waste they are committing and threaten to commit, until the determination of the title by the tribunals to which the adjudication of it is confided by law shall take place, and that a receiver be appointed to take charge of the property intermediately.

This bill has been met by a demurrer and an answer. Double pleading in a court of equity is not allowable; and the answer in this case being a general one, overrules the demurrer upon the settled doctrine of the court: *Taylor v. Luther*, 2 Sumner, 230. So that the demurrer may be dismissed without further observation, and the case stand on the bill and answer: *Ibid.*

When the motion for injunction was made, the solicitors for defendants objected to any affidavit offered by complainants as to title. It was agreed that such affidavit might be read, and its admissibility argued on the discussion by counsel of the merits, and decided by the court in its opinion. Affidavits for defendants responsive to those on the part of complainants as to title, were admitted to be read, subject to the decision which should be made by the court on the admissibility of the complainants' affidavits to title.

This motion for an injunction could be disposed of in a comparatively brief time; but the objections urged against the jurisdiction of the court, and to the character and form of this proceeding, have been numerous, and urged with so much zeal and apparent conviction in their correctness that it is proper that special notice should be taken of them, in the hope of convincing parties that the court has "fairly considered the case, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised in the case."

The first question, then, is the admissibility of affidavits as to title, presented by defendants.

Admission of Affidavits.

The right of the plaintiff to read affidavits on a motion for injunction is declared to be a well-settled rule. It is his unquestionable right, say the court in *Kensler v. Clark*, 1 Richardson, 620, to read affidavits on an application for an injunction in the support of the allegations in his bill before the coming in of the answer; and as constituting a part of his case, they may be read on any subsequent motion to perpetuate or dissolve the injunction. But the court lays down the rule that no affidavits filed subsequently to the coming in of the answer can be read, for the reason it was calculated to surprise the defendant. The only exception to this rule of the right of plaintiff is to be found in the cases of waste and such as are analogous, for the purpose of preventing irreparable mischief; and that exception limits the affidavits to waste, insolvency, or other collateral fact, and does not permit them to extend to the question of title. This exception as to affidavits as to title was asserted by Lord ELDON in *Morphett v.*

Jones, 19 Vesey, 350, and in *Norway v. Rowe*, Ib. 157; and seems to be recognized by the text writers, by the case cited above from South Carolina, and by other decisions.

Mr. Justice STORY, in the case of *Poor v. Carleton*, 3 Sumner, 70, 77, has intimated his doubts as to the existence of a good reason for the rule which denies the right of a complainant to read affidavits as to title, in a case of irreparable mischief; and the remarks of the learned judge upon the point are entitled to much consideration, and may lead hereafter to a qualification of the rule. The proposition for which he contends is, that affidavits to title should, upon general principles, be looked to, not for the purpose of establishing title, but to enable the court to see if probable foundation existed to believe that the complainant may establish his title and be liable intermediately to irreparable injury.

In the case of *Tobin v. Walkinshaw*, decided by this court, it went into a full consideration of the case of *Poor v. Carleton*; and inasmuch as the point was not directly before the court in that case, and the learned judge in that case admitted that affidavits to title were only to be looked to for a qualified purpose, considering too, as well settled, that on a motion for an injunction a court of equity is not to look into title, this court came to the conclusion it would be better to adhere to the ancient rule until qualified by some authoritative decision directly on the point. The court, therefore, decided that affidavits to title could not be read. The law announced in that case must be applied to the present, and so much of the affidavits of plaintiff in this case as goes to title must be discarded by the court in the adjudication of this motion. The affidavits of the defendants, which were admitted to be read as responsive to plaintiff's affidavits, must be also rejected. As the court excludes the plaintiff's, on a consideration of the question of their admissibility, which by consent of parties when they were read was reserved for its decision, the affidavits of the defendants must share the same fate. The only ground on which they could be received was that they were responsive to the affidavits of complainant as to title. In the absence of any such, no rule is better settled than that defendants can not read affidavits to support their answer: 1 Hoffman's Ch. P., 360; *Roberts v. Anderson*, 2 Johns. Ch. R., 202. In the

language of Lord ELDON, in *Norway v. Rowe*, 19 Vesey, 157, "The title must be taken on the answer." The case, therefore, is to be discussed on the pleadings—the allegations in the bill as verified by the affidavits accompanying them, exclusive of any portion of them which go to title, and the denials in the answer.

Necessary Parties.

A preliminary inquiry is, as to the jurisdiction of the court as to the parties.

The decision of this court in the case of *Tobin v. Walkinshaw*, has been cited as an authority which settles the question raised in favor of the objection taken by the defendants' counsel to the jurisdiction of this court, on the ground of want of parties.

A reference to the structure of the bill in that case and in this, will show that whatever may have been the language of the court *arguendo* in that case, it can not be cited as an authority in the present. In that case it was alleged that defendants held under a conveyance from one Andres Castillero. There was no allegation that he was beyond the jurisdiction of this court, nor any prayer that he might be brought into court, should he at any time come within the reach of its process. It prayed for the cancellation of deeds in the hands of absent persons; it prayed for an account of all the profits of the mine for the preceding year, and for a perpetual injunction. By the subsequent pleadings it was ascertained that two persons resident in this city, within the jurisdiction of this court, equally interested with defendants, were not made parties to the bill. It was in relation to such a bill the court said, "But the bill asks that an account of profits belonging to other people be taken, and title deeds to property in which those other and absent persons are much interested and to a larger extent than the defendants themselves, shall be canceled." The court further said, "But there is one feature in this case which distinguishes it from all others. It is, that two absent persons (Parrott and Bolton), whose interests would be affected by a decree, are residents of this city, and within the reach of the process of this court. But if by bringing them before the court this case would be beyond the

jurisdiction of this court, can the court by indirection adjudicate upon their rights, and thus do indirectly what it could not do directly?"

Now, the present bill makes all persons in interest, within the reach of the process of the court, parties to the bill. It alleges that certain persons who are absent from this State hold possession of the mine, by the defendants as their agents, and prays, if they come within the jurisdiction of this court, they may be made parties. It asks for the delivery and cancellation of no deeds, nor any account of profits. It asks from the defendants the value of the ore extracted and carried away by either of them, or by any other person with license and consent of them, or either of them, while in possession, as alleged wrongdoers, of the premises.

It alleges that under the act of 3d March, 1851, entitled "An act to ascertain and settle private land claims in the State of California," a petition in conformity with the provisions of that act has been submitted to the board of land commissioners in the name of one Andres Castillero, for and in behalf of defendants, asking for a confirmation of the claim to the premises in dispute held under a Mexican title; which proceeding is pending on appeal before the District Court of the United States for the Northern District of California, before which tribunal the alleged title of the premises is now awaiting adjudication. The bill prays for an injunction to enjoin the destruction of the premises before the termination of that adjudication.

The averment of the answer which raises the objection to the jurisdiction is that certain persons, resident in foreign countries, are associated with defendants, and the names of some of them are unknown. The lands and mine are admitted to be in possession of the agents of the company of which the said non-residents are parties. The question presented is whether, where the parties are prosecuting a claim in the district court by their attorneys, and holding possession and enjoying the proceeds of the premises by their agents, the court has the power to protect the property, or is deprived of that power because some of the parties are without the jurisdiction of the court.

The affirmative of this proposition, if sustained, would be

attended with singular results. It would only be necessary for parties to associate themselves with foreign parties who were beyond the process of this court, and entire exclusion from any equitable relief required by others who may have rights to or claims on the property in their possession, would be the result.

The general rule in a court of equity is, that all persons who are interested in the object of the bill are necessary and proper parties. There are exceptions to this rule, which are governed by one and the same principle, which is—as the object of the general rule is—to accomplish the purposes of justice between all the parties in interest; and it is a rule founded in some sort upon public convenience and policy rather than upon positive municipal or general jurisprudence. Courts of equity will not suffer it to be so applied as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable: Story's Eq. Pl., § 77. The first exception to the rule stated by Judge Story is founded upon the utter impracticability of making the necessary or proper parties, by reason of their being beyond the process of the court: *Ibid.*, § 79. This ground of exception is peculiarly applicable to suits in equity in the courts of the United States. If, therefore, this rule as to parties were of universal application, many suits in those courts would be incapable of being sustained therein; and Judge Story states that the general rule in the courts of the United States is to dispense, if consistently with the merits of a case it can possibly be done, with all parties over whom the court would not possess jurisdiction: *Ibid.*, § 79.

Parties to bills are divided into three classes—nominal, necessary and indispensable.

The act of Congress of 28th February, 1839, 5 U. S. Statutes, 321, and the 47th rule of equity of the circuit courts of the United States were enacted to remove the disability alluded to by Judge Story, in the circuit courts, in the administration of justice, where some of the parties were beyond the jurisdiction of the court. The judicial construction placed upon those enactments is, that they have dispensed

with the duty of making nominal or necessary parties where it is impracticable to do so by reason of their being beyond the reach of the process of the court; but the presence of an indispensable party is as necessary to the jurisdiction of the court as it was before the enactment of the rule and the law. The presence of an indispensable party is demanded by the consideration that no court of equity, however general its jurisdiction, can adjudicate directly upon the rights of a party unless he is actually or constructively present: 12 Wheaton, 194. The absent parties are undoubtedly necessary parties, and, had they been within reach of the process of this court, must have been made parties to the record. But are they, under the circumstances, so indispensable as parties, as to prevent any decree by this court?

In this case it is alleged in the bill that certain parties reside out of the jurisdiction of this court; and it prays that they may be made parties whenever they shall be found within its jurisdiction, in conformity with the 22d rule of equity. The answer admits that they reside beyond the jurisdiction of the court, and the names of some of them are unknown to defendants. It admits the possession of the property by the agents of those absent parties, which agents are made parties to this bill. The same parties are in the district court prosecuting a claim to the same property in the name of Andres Castillero against the plaintiffs. No act is required to be done by these parties. They are before the district court, where their rights in the property are to be adjudicated. Not actually, they are constructively present on this motion.

In the case of *Osborn v. United States Bank*, 9 Wheaton, 738, the bill was against, and the decree was rendered against, an individual who was the agent of another, who was not a party to the bill, being a sovereign State, and who could not be made a party. The objection in that case was that as the real party can not be brought before the court a suit could not be sustained against the agents of that party. "Why," ask the court, p. 843, "may not it [this court] restrain him from the commission of a wrong which it would punish him for committing?" The case of *Osborn v. United States Bank* was a demand for money of the principal in the hands of an agent, which belonged to a principal not a party to the record.

Hence, this court in its opinion in the case of *Tobin v. Walkinshaw*, in commenting on that, stated as one of the grounds of difference, that in the case of *Tobin v. Walkinshaw* "there is no question of principal and agent in this case."

There would seem to be no reason to restrain the court from acting, for want of parties. To do so in this case would be a denial of justice. The parties, while using another judicial tribunal for the confirmation of their alleged title would be enabled by reason of the absence of some of them without the jurisdiction, to bar the party against whom they are prosecuting their claim to the property, from the interposition of this court to preserve and protect that property pending such prosecution. The foreign parties would thus be making use of an American tribunal to enforce their claim, while they availed themselves of their absence to preclude the complainants from a right to which the humblest individual is entitled,—to invoke an injunction for the preservation of the property; for only to that extent can the action of this court go.

Judge Story lays down the ordinary rule to be, that where the persons who are out of the jurisdiction are mere passive objects of the judgment of the court, or *their* rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. If such absent persons are to be active in the performance and execution of the decree, or if they have rights wholly distinct from those of other parties, or if the decree ought to be pursued against them, they are indispensable: Story's Eq. Pl., § 81.

Speaking of a defect for want of parties, this author says, "In many instances the objection will be fatal to the whole suit. In others, it will not prevent the court from proceeding to the decision of other questions between the parties actually before it, even though such a decision may incidentally touch upon or question the rights of the absent parties:" *Ibid.*

In *Smith v. The Hibernian Mine Co.*, 1 Sch. & Lefroy, 238, Lord REDESDALE says, "The ordinary practice of courts of equity in England, when one party is out of the jurisdiction and other parties within it, is to charge the fact in the bill; and then the court proceeds against the other parties notwithstanding he is not before it. It can not proceed to

compel *him* to do any act, but it can proceed against the other parties; and if the disposition of the property is in the power of the other parties, the court may act upon it." I remember (says the chancellor) a case where a bill was filed to sell an estate for payment of debts, and the heir at law, who was entitled to the surplus after payment of debts, was out of the jurisdiction. The court ordered the estate to be sold for the payment of debts; the heir (say the court) might file a bill to set aside the proceedings if they were erroneous.

In the case at bar, no act is required to be performed by the absent parties in the execution of the decree; their interests are incidental only to those of defendants, and they are passive parties; the possession of the property is in them by their agents. They may come into this court at any time; they are, in the name of Castellero, prosecuting for the confirmation of their claim to the property in the hands of their agents, the defendants.

The case of *Coiron v. Millaudon*, 19 Howard, 113, has been cited by defendants' solicitors. In that case the bill was filed to set aside a sale of property on the ground of irregularities in insolvent proceedings. If the sale were set aside, the defendants would have been enabled to recover from the creditors who had received their money. The court say, "The creditors, therefore, are the parties chiefly concerned in these proceedings, and as it respects those to whom the proceeds of the estate have been distributed, they are directly interested in upholding the sale; for if it is set aside, and the proceedings declared a nullity, they would be liable to refund the share of the purchase money each one had received in the distribution."

This latter case simply affirms the principle announced in *Mallow v. Hinde*, 12 Wheaton, 194. and in *Tobin v. Walkinshaw*, decided by this court, that indispensable parties, as they were considered in those cases to have been, could not be dispensed with.

We can not consider the objection to the jurisdiction for the want of parties as tenable.

New Matter in Answer.

Whether the answer should be regarded on this motion more than an affidavit, is the next question which has been

raised. The ~~ancient~~ doctrine may be as contended for by the solicitors of complainants, but we think that upon the ground of reason and more recent authority, all direct denials in the answer responsive to the allegations of the bill, and not matters of avoidance, ought to have the effect of an answer as evidence on this motion as on a final hearing.

On a motion to dissolve an injunction, Mr. Justice Story says, the ground of "dissolving an injunction upon a full denial by the answer of the material facts is, that in such a case the court gives entire credit to the answer, upon the common rule in equity that it is to prevail, if responsive to the charges of the bill, until it is overcome by the testimony of two witnesses, or of one and other stringent corroborative circumstances." 3 Sumner, 77.

It is evident, then, that Judge Story considered that even on a motion to dissolve an injunction, the same effect was to be given to the answer as is to be given to it on the hearing.

As to the effect to be given to matters set up in the answer by way of avoidance, there has been some conflict of authority. In New York, South Carolina and New Jersey, the doctrine is well settled that matter of avoidance set out in the answer responsive to the allegations in the bill, are to be considered as equivalent to an affidavit on a motion for injunction. In Maryland and Georgia, a contrary doctrine obtains. In the former State (3 Bland Ch. R. 162), while enforcing their view of the rule, the court did so upon a single authority in Bardiston's Ch. Reports, one hundred and thirty years old; and the Maryland court say, "that the rule was not mentioned in any English digest, compilation, or book, other than that book."

The court in Georgia (1 Kelly, 7), relied solely for their construction on the case of *Hart v. Ten Eyck*, 2 Johns. Ch. 63. But the decision in this case has been repeatedly reversed in New York.

As to the effect of the answer, then, in this case, the court considers that on this motion, the denials made in it on personal knowledge, direct and responsive to the bill, are to receive the consideration due to them as if it was on the hearing, but that matters set up by way of avoidance are to be received as affidavits.

As this question was raised at the bar, it is deemed proper to dispose of it, were it only to settle the practice of this court in view of the conflict of authority which exists.

Jurisdiction of U. S. Courts.

The next subject of inquiry is the objection made to the jurisdiction of the court, by reason of the subject-matter. It is urged that its jurisdiction is special and limited, and does not extend its aid in an auxiliary proceeding to a court not governed by the principles of the common law. That this proceeding is auxiliary, and not the exercise of original jurisdiction, and is dependent upon that now exercised by the district court under the act of 1851. That the suit must be depending in a common law court, and between the same parties; and the case of *Clarke v. Mathewson*, 12 Peters, 164, and that of *Dunlap v. Stetson*, 4 Mason, 349, are cited to sustain these propositions. These cases were decided upon the question of jurisdiction as to the want of parties. Nothing was before the court as to jurisdiction as to the subject-matter. It had been decided by Judge Story (2 Sumner, 262, 268), that a bill of revivor, being a suit between the citizens of the same State, the court had no jurisdiction. On appeal to the Supreme Court in 12 Peters, 164, they reversed the decision of the court below; and all that was decided was that a bill of revivor was not an original bill, but a mere continuation of it, and if the plaintiff in the original suit was competent to sue in the circuit court, his administrator, though a citizen of the same State with defendant, might revive the suit, the two bills being considered one and the same case.

The case cited from 4 Mason, 360, related also to the jurisdiction as to parties, the point being whether the suit could be sustained, the defendant being a citizen of Massachusetts, and not resident in Maine, and the subpoena having been served upon him in Massachusetts; and the decision was, that injunction would be issued by the court to enjoin a judgment obtained in the same court, although the original plaintiff is a citizen of another State, and this upon the ground that the injunction bill was part of the original bill. The court can not consider that these cases, which were decided on the question of jurisdiction under Sec. 11 of the Judiciary Act, have any bearing on the

jurisdiction as to subject-matter. They decide that an injunction bill is part of the original bill it seeks to enjoin, and that in the issue of it the court is not in the exercise of original jurisdiction; and they predicate the same decree of a bill of revivor. But what is the jurisdiction of this court as to the subject-matter, they do not establish. This must be done by reference to the constitution, acts of Congress, and the judicial construction they have received.

There is no doubt that the jurisdiction of the circuit courts of the United States is limited to certain persons and subjects, but within those limits is the same in every State, and complete and full.

The Constitution provides, Art. 3, Sec. 2, that the judicial power shall extend to all cases in law or equity specified therein, among which are enumerated "Controversies to which the United States shall be a party." The Judiciary Act of 1789 (1 U. S. Statutes, 78), enacts that the circuit courts shall have original cognizance with the courts of the several States, of all suits at common law and in equity, where the matter in dispute exceeds the sum of five hundred dollars, and the United States are plaintiffs or petitioners.

By the act organizing this court (10 U. S. Statutes, 631), it is declared that the court organized thereby "shall in all things have and exercise the same jurisdiction as is vested in the circuit courts of the United States, as organized under existing laws."

The *jurisdiction* of the circuit courts of the United States is thus summed up by the Supreme Court, in *The State of Pennsylvania v. The Wheeling Bridge Company*, 13 Howard, 563: "Chancery jurisdiction is conferred on the courts of the United States, with the limitation that suits in equity shall not be sustained in either of the courts of the United States in any case where *plain, adequate and complete* remedy may be had at law."

The Supreme Court has placed in several cases a judicial construction upon these words. In *Boyce v. Grundy*, 3 Peters, 210, they say that the words "plain, adequate and complete" were *declaratory*, making no alteration in the rules as to equitable remedies. In *Robinson v. Campbell*, 3 Wheaton, 212, that to determine the signification of these words

resort must be had to the principles of the common law of England, and not to the laws of the State where the court sits; and that if the State law has given a legal remedy for an equitable right, the jurisdiction of the circuit court is not affected; and that to *bar* a suit in equity, the remedy at law must be as efficient to the ends of justice and its *complete* and *prompt* administration, as the remedy in equity: 3 Peters, 210.

It is difficult to see how, under the constitution, the Judiciary Act, and the judicial constructions given, it can be successfully urged that the circuit courts, within the limits prescribed as to persons and subjects, have not a complete and full equity jurisdiction.

In this case the court has jurisdiction as to parties, because the United States are plaintiffs. They have jurisdiction of the subject-matter, because it exceeds the amount in value prescribed by law, and because there is no "plain, adequate and complete remedy" for the injury complained of. Whether, in affording the relief, they exercise original or auxiliary jurisdiction, has nothing to do with the question, unless an inquiry should arise where a party whose citizenship does not entitle him to invoke the original jurisdiction of the federal courts, attempts to do so. The jurisdiction of the circuit courts of the United States has been defined by the Supreme Court.

In *The State of Pennsylvania v. The Wheeling Bridge*, 13 Howard, 563, the Supreme Court say, "The rules of the High Court of Chancery have been adopted by the courts of the United States, and there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States. In exercising this jurisdiction, the courts of the Union are not limited by the chancery system adopted by any State, and they exercise their functions in a State where no court of chancery has been established. The usage of the High Court of Chancery in England, whenever the jurisdiction is exercised, governs the proceedings. This may be said to be the common law of the country, and since the organization of the government, has been observed. Under this system, where relief can

be given, similar relief may be given by the courts of the Union."

We can not, therefore, consider the objection to the jurisdiction of this court as to the subject-matter, available. In granting the relief prayed for, it has all the powers of the English Chancery.

Equitable Relief against Trespass.

We have seen that within the limits of their jurisdiction as to persons and subject-matter, the only restriction upon their equity powers is, that there be no plain or adequate remedy at law.

Have the plaintiffs such complete remedy at law as should bar this suit? The rule is, that the party may come into equity, although he has a remedy at law; if such remedy be not plain, complete and adequate, *a fortiori*, if he has no remedy at law, he is entitled to the aid of a court of equity. The protection of the mine is the object contemplated by this bill; the preservation of its substance, until the title to it is ascertained by the tribunals to which the question is exclusively confided, is the prayer of the bill. That tribunal has no jurisdiction as to waste or destructive trespass. The title is the only question left to their decision. They have no power to save the property from destruction; and if this court possess none, complainants are without remedy. The administration of justice can neither be "complete nor prompt."

Stress has been placed upon the fact that previously to the institution of this bill, no action at common law has been instituted by complainants. It is urged that such step was necessarily preliminary to the filing of this bill, and the very form of the action is prescribed. Now in the ordinary course of things, where one claims title to real estate, his first step ordinarily is to enforce his claim in one of the ordinary courts of justice, in the form of an action of trespass to try title, or one of ejectment. The limited jurisdiction of a court of law may render it necessary that he should have the interposition of a court of equity to obtain a discovery in aid of his common law suit; or he may have a defense equitable in character, of which he could not avail himself in a court of law; or the plaintiff may be attempting to avail himself of a legal title

inequitably; and in many other instances it may be necessary to invoke the jurisdiction of equity. The fact that a party has not taken this usual step is matter of suspicion, and clearly shows, where no reasons exist for the omission, the want of that diligence the law requires from parties in the pursuit of their alleged rights. Hence, we find frequent allusions in the cases to the fact whether the party has instituted his action at law before he came into equity; and in a certain class of cases the courts have refused to interfere when an action at law has not been brought. The rule is, however, by no means universal. That the institution of an action at common law is an *indispensable* prerequisite in all cases to the institution of a bill for an injunction, can not be admitted. No case has been cited which has made the omission of a party to have previously instituted a suit at law, the sole ground for refusing an injunction, where fraud was alleged and irreparable mischief the injury sought to be remedied. But the reasons for the ordinary rule do not exist in this case; and the maxim "*Cessante ratione cessat et ipsa lex*," must apply.

There is a pending litigation between complainants and Andres Castillero, under whom defendants claim, and in whose name they are, in their own behalf and that of their associates in interest, now prosecuting the title to the premises in dispute. To protect the substance of that property pending that litigation, is the object of this bill. The objection is that such litigation must be pending in a particular form, and in a court of common law. We do not consider this proposition correct, and the cases where the courts of chancery in England have interposed to protect property in litigation in the ecclesiastical courts, disaffirm that doctrine. To these we shall hereafter refer. For the present we will inquire whether, under the peculiar circumstances of this case, the omission of the complainants to have instituted an action in a court of common law to try title, is sufficient to defeat the present application. It is true, the United States hold a legal title to the premises. Suppose that, counting upon that title, they had sued for the recovery of the possession, might not the defendants in that suit have pleaded to the action the act of Congress passed 3d March, 1851, entitled an "Act to ascertain and settle the private land claims in the State of California," and their proceedings under it pending in the district court?

By that act the United States are bound to hold their title subservient to the adjudication of special tribunals, with rules of decision very different from those which obtain in the ordinary tribunals of the country. An attempt on the part of the United States, so long as that act is unrepealed, to avail of their legal title in a court of common law, would have been inequitable and unjust. They have made no such attempt. They do not propose to do so by this bill, further than as they allege it is necessary, in order to preserve the property until the question of title is determined as provided for by law. The fact that they have made their title dependent upon the action of special tribunals, and thus have deprived themselves of the right to enforce it at common law, can not bar them from enforcing their equitable right to prevent the destruction of the property, on the ground that they had not previously to their application brought an action at common law to enforce that title.

Another objection to the relief prayed for is, that an injunction can not be granted to enjoin a trespass where the title is disputed.

In a case of mere trespass, or a technical waste where the mischief is not imminent, where no equitable circumstances appear and no fraud is alleged, and where the title of plaintiff is disputed in the manner prescribed by law, the rule is correctly stated.

Where the mischief sought to be protected against is irreparable and imminent, where the bill alleges fraud and antedating in the execution of the title-papers set up by the defendants, and their genuineness is affirmed only on information and belief—the case does not exist, to the knowledge of this court, where the rule contended for is to be literally applied. No one of the cases cited by the solicitor for defendants reaches this case. The authorities are numerous. To comment upon them in detail would be an unconscionable consumption of time.

The strongest case cited from the English authorities is that of *Pillsworth v. Hopton*, 6 Vesey, 51; and from the American, those of *Storm v. Mann*, 4 Johns. Ch. 21, and *Perry v. Parker*, 1 Woodbury & Minot, 281.

In the former case the lord chancellor said, "I do not rec-

ollect that the court ever granted an injunction under any such circumstances." The character of the waste is not mentioned; and his lordship concluded by saying, "I remember perfectly being told from the bench, very early in my life, that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court." Now, this parol authority which his lordship applied to that case, decided in 1801, must have carried back his memory to about the middle of the eighteenth century. In 1837, nearly a century afterward, Judge Story says, "Indeed, there are numerous cases which show the gradual meliorations or changes, often silent and almost unperceived, which have been introduced into the practice of the courts of equity, to obviate the inconveniences which experience has demonstrated, and to adapt the remedial justice of these courts to the new exigencies of society." The learned jurist adverts to an instance by way of illustration and, in a subsequent part of his opinion, alludes to the qualification of the doctrine which existed, that affidavits could not be read in support of the title of the plaintiff, which is contradicted by the answer. "I can not well see," said he, "why the court, to prevent irreparable mischief, may not look to affidavits in affirmance of the plaintiff's title, not so much with a view to establish that title, but to see whether it has such probable foundation, in the present stage of the cause, as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing it should turn out to be well founded." Judge Story has alluded to the proposition laid down by the chancellor in the case of *Pillsworth v. Hop-ton*, and says, "The interference of courts of equity in restraint of waste may have been originally confined to cases founded in privity of title; and for the plaintiff to state a case in which the defendant pretended that the plaintiff was not entitled to the estate, or in which the defendant was asserted to claim under the adverse right, was said to be for the plaintiff to state himself out of court. But at present the courts have by insensible degrees enlarged the jurisdiction to reach cases of adverse claims and rights not founded on privity, as for instance, to cases of trespass with irreparable mischief:" Story's Equity Jurisprudence, § 918.

In *Pillsworth v. Hopton* it is also to be observed that the plaintiff had failed in an ejectment suit he had brought; and further, there was no equitable circumstance calling for the interposition of a court of equity.

In the second case, that of *Storm v. Mann*, 4 Johns. Ch. 21, decided in 1819, cited to sustain the general proposition as to dispute of title, the defendant had been for a long time, and was at the time, in possession; the nature of the waste is not stated, and no special ground was taken for equitable relief, nor any explanation made for the delay. The principle asserted in this case is, that a court of equity will not interfere where rights are properly determinable in a court of law where an adequate remedy can be found. In this case the court referred to the case of *Pillsworth v. Hopton*, above referred to, as an authority for saying, "If the plaintiff in his bill states an adverse claim in the defendant, he states himself out of court." We have seen the views of Judge Story on this point; and it is extraordinary that the principle ever should have been asserted in any case in such general terms that a party setting forth an adverse claim in the bill states himself out of court.

There are few cases which can be imagined where one enters upon land and exercises acts of ownership, that he can not be said in common parlance to dispute the title of the owner so soon as he is known to him. We shall see, by reference to authority, that no such principle now exists.

The last American case cited is that of *Perry v. Parker*, 1 Woodbury & Minot, 281. The bill in this case was to enjoin the cutting of the dam and gates of the complainant, and Mr. Justice Woodbury, after noticing the cases in which injunction has been refused on the ground of the right being disputed, says, "Some cases of necessity, where the danger is great and the injury irreparable, may in England be regarded as exceptions;" and he refers to several cases decided in the High Court of Chancery. It is to be observed that in this case there was no fraud alleged, no irreparable mischief suggested nor other equitable circumstances. The judge, in the absence of them, refused the injunction. But he states, after alluding to the exceptions in England, his own convictions as to the law. "And I am inclined to hold," he said, "that a mere denial of

title is never sufficient, as such denial may be made for delay and mischief, unless as before remarked it is accompanied by circumstances showing it to be in good faith." If a denial unaccompanied by other circumstances is never sufficient, it seems that a denial on mere "information and belief" as in this case, of the charges of fraud, forgery, and antedating made against the documentary title of defendants, would be insufficient. A careful examination of all the authorities cited by defendant only shows, in the opinion of the court, that in the case of common trespass, in the absence of equitable circumstances, an injunction will not issue if the title of plaintiff is disputed; that the pendency of a suit is not of itself a ground for the interference of a court of equity; that a party may by laches, or delay unaccounted for, or by an omission to bring an action at law, there being no reason for the omission, deprive himself of the right to the interposition of a court of equity.

There is no one of those cases which assert that a party, by simply disputing plaintiff's title, can defeat his application, in a case resembling the present.

The true rule will be found by referring to the English and American authorities.

That decisions directly in point, on either side, are to be found to every part of this case, is not to be expected. It is novel in some of its features. But a new case does not create necessarily a new principle. C. J. Marshall, in *Osborn v. Bank United States*, 9 Wheaton, 841, stated, "The appellants admit that injunctions are often awarded for the protection of parties in the enjoyment of a franchise, but deny that one has ever been granted in such a case as this. But, although the precise case may never have occurred, if the same principle applies the same remedy ought to be afforded."

Principles have been enunciated both in England and this country, the application of which will dissipate all difficulty arising from the novelty of this case.

Lord Redesdale, than whom there is no higher authority, and of whom the court say, in *Bogardus v. Trinity Church*, 4 Paige's Ch. 195, "His opinion upon a case of equity pleadings is always esteemed the highest authority," and in England, where his treatise is received by the whole profession, "as an authoritative standard and guide," is clear and full upon this point.

This author, in enumerating the general objects of the jurisdiction of a court of equity, includes the following:

1. Where the principles of law by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose. 2. Where the principles of law by which the ordinary courts are guided give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent. 3. To provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests: Mitford's Ch. Pl. 111.

Again, he lays down the rule that "pending a litigation, the property in dispute is often in danger of being lost or injured, and in such cases a court of equity will interfere to preserve it, if the powers of the court in which the litigation is depending are insufficient for the purpose."

Thus, during a suit in an ecclesiastical court for administration of the effects of a person dead, a court of equity will entertain a suit for the mere preservation of the property of the deceased till the litigation is determined, although the ecclesiastical court, by granting an administration *pendente lite*, will provide for the collection of the effects: *Ibid.* 158.

In Daniell's Ch. Practice it is stated, that "an injunction will be granted in some cases where the parties have both legal titles and legal remedies, but irreparable mischief would be done unless they were entitled to more immediate relief than that which they could obtain at law; it has accordingly been granted when the injunction amounted in fact to an injunction to stop a trespass; for if the court would not interfere against a trespasser, he might go on by repeated acts of damage which would be absolutely irremediable."

The author refers to *Flumang's case*, in which Lord Thurlow refused to enjoin a mere trespass, but subsequently changed his opinion on the ground that irreparable mischief would follow his refusal; holding, in effect, that if the defendant was using the substance of the thing, the liberty of bringing an action was not the only remedy to which in equity he

was entitled; and the author concludes: "The same principle has been acted on and applied without scruple in various other decisions; for unless there was a jurisdiction to prevent destruction or irreparable mischief, there would be a great want of justice in the country": 3 Daniell's Ch. P. 1854.

The foregoing are the expositions of the general doctrine by two standard text writers, and they presuppose that the property sought to be protected was in dispute.

In *Poor v. Carleton*, Mr. Story does not confine himself to the question of title as raised upon the pleadings, but is of opinion that affidavits as to title ought, on general principles, to be permitted to be read. Whence the necessity, in any case, of reading affidavits as to title of plaintiff, unless upon the ground that such title has been disputed?

The authorities which exclude affidavits to title do not do so upon the ground that defendant has disputed the title of plaintiff, but because the court has no jurisdiction to establish title between the parties.

In *The United States v. Gear*, 3 Howard, 120, the defendant had been sued in two actions, at law and in equity, and they involved his right to a tract of land upon which there was a lead mine. The first was an action of trespass and the second a bill in chancery to stay waste, on the equity side. The defendant, by his pleas to the common law suit, raised the question of title. The same question was raised in the equity cause. Both cases were carried up on a division of opinion between the judges, to the Supreme Court. Among other questions raised in the equity cause was the right of complainant to an injunction; which was granted.

In *Kensler v. Clark*, 1 Rich. 617, a bill was filed for an injunction to restrain from waste or cutting timber. The defendant insisted in his answer that he had a perfect title to the premises, and set it out. The chancellor, in his decree, discussed the question of right, and decided in plaintiff's favor, and ordered an injunction to issue. On an appeal (Chancellors Johnson, Harper and De Saussure, justices) the court declined to decree on the question of title, but sustained that portion of the chancellor's opinion which went to the issue of an injunction.

"The claim," said Chancellor De Saussure, "of both par-

ties to the title was set forth in the pleadings; and the chancellor on the circuit, to put an end to litigation and the multiplicity of suits, made a decree on the question of right.

"But, as this court is unwilling to decide on the question of title, which is pending in a suit at law, it will make no decree on the appeal on that ground, but will leave the parties to the litigation of the title to the court of law, to which the court remits them." The court confined itself to the appeal from the decree of the chancellor granting an injunction. The appeal was made on the ground that in a case of trespass no injunction ought to be granted. Neither the chancellor below nor the appellate tribunal considered that the right of complainant to an injunction was defeated by defendant disputing the title, and setting up in his answer an adverse one. The Court of Appeals say (De Saussure delivering the opinion) "On a careful examination, I concur entirely with him in directing an injunction to be issued in this case. He has placed the interposition of the court, for the protection of the land in question from irreparable mischief, on the true grounds, and I entirely concur with him. Nor is this doctrine and practice new in England or in this country."

The court can not believe, in view of the foregoing authorities, that no injunction can in any case be granted where the title is disputed, in a case of trespass of the character complained of in this case.

Denial of the Equities of the Bill.

Thus far the attention of the court has been limited to the objections urged by defendant's solicitors to the jurisdiction of the court and the mode of procedure. The remaining question is one raised by one of the grounds of defense taken, viz., that the defendants are protected by the answer.

This is a substantial defense. It is the ordinary question which arises on a motion for an injunction, or to dissolve an injunction (if previously granted) on bill and answer. A decision of it covers the whole merits of this motion.

When an answer denies directly and positively from personal knowledge the material allegations of the bill, it "denies the equity of the bill," and the court is bound to consider it as evidence to which entire credit is to be given, until dis-

proved by two witnesses, or one with stringent corroborative circumstances. Acting upon it as such, the court, in the absence of extraordinary circumstances, will dissolve the injunction if previously granted. If, on the contrary, such denials are not or can not be made, they will consider that the allegations of the bill have not been disproved. The rule on this point, with its qualifications, will appear by reference to the authorities.

The general rule is, that an injunction is to be dissolved when an answer comes in and denies all the equity of the bill. This is the rule in ordinary cases; but, to use the words of Lord Eldon in *Clapham v. White*, 8 Vesey, 36, there are "excepted cases;" such are, mismanagement of partnership concerns, cases of waste or destructive trespasses, patent cases and cases of irreparable mischief. But even in those cases to which the general rule applies, the answer, to have the effect of dissolving the injunction or preventing its issue, must be specific and positive.

In *Poor v. Carleton*, 3 Sumner, 77, Judge Story says, "But supposing the doctrine [which he by no means admits] were as comprehensive as to the dissolving an injunction on the coming in of the answer as the counsel has contended for, the question occurs whether it is applicable to all kinds of answers which deny the whole merits of the bill, or whether it is applicable to such answers only as contain statements and denials by defendants consonant of the facts and denying the allegations upon their own personal knowledge. It seems to me very clear, upon principle, that it applies to the latter only."

"The ground of the practice of dissolving an injunction upon a full denial, by the answer, of the material facts is, that in such a case the court gives entire credit to the answer, upon the common rule in equity that it is to prevail, if responsive to the bill, until it is overcome by the testimony of two witnesses, or of one and other stringent corroborative circumstances. But it would certainly be an evasion of the principle of the rule, if we were to say that a mere naked denial, by a party who had no personal knowledge of any of the material facts, were to receive the same credit as if the denial were by a party possessing actual knowledge of them."

"In the latter case the conscience of the defendant is not at all sifted, and his denial must be founded upon his ignorance of the facts and merely to put them in a train for contestation and due proof to be made by the other side." The learned judge proceeds: "What sort of evidence can that be which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff's claims; but merely establishes that the defendant has no personal knowledge to aid it, or disprove it. It is upon this ground that it has been held, and in my judgment very properly held, that if the answer does not positively deny the material facts or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction." 3 Sumner, 78.

Judge Story has thus compendiously embodied the doctrine and the reason for its existence. His remarks were made on a motion for the dissolution of an injunction *after* answer. They apply to the present motion for an injunction *after* answer; for surely, if an answer does not so deny the material allegations of the bill as will authorize the *dissolution* of an injunction; such answer will not prevent the *issue* of one in a proper case.

In *Clark's Ex. v. Riemsdyk*, 9 Cranch, 160, the court say: "If a defendant asserts a fact (in his answer) which is not and can not be within his own knowledge, the nature of his testimony can not be changed by the positiveness of his assertion. The strength of his belief may have betrayed him into a mode of expression of which he was not fully apprised. When he intended to utter only a strong conviction of the existence of a particular fact or what he deemed an infallible deduction from the facts which were known to him, he may assert that belief or that deduction in terms which convey the idea of his knowing the fact itself. Thus, when the executors say, that John Innes Clark never gave Benjamin Munro authority to take up money or to draw bills; when they assert that Riemsdyk, who was in Batavia, did not take this bill on the credit of the owners of the Patterson, but on the sole credit of Benjamin Munro, they assert facts which can not be within their own knowledge. In the first instance, they speak from *belief*; in the last, they swear to a *deduction*

which they make from the admitted fact that Munro could show no written authority. These traits in the character of the testimony must be perceived by the court, and must be allowed their due weight, whether the evidence be given in the form of an answer or deposition. The respondents could found their assertions only on belief; they ought so to have expressed themselves; and their having, perhaps, incautiously used terms indicating knowledge of what, in the nature of things, they could not know, can not give to their answer more effect than it would have been entitled to had they been more circumspect in their language."

A practical illustration of this doctrine, as applicable to an affidavit on a motion for injunction, is to be found in the case of *Davis v. Leo*, 6 Vesey, 785, in which Lord Eldon says: "There is no positive affidavit in this case that the will was made, under which the plaintiff is next tenant for life, to the defendant, Leo. This is a mere hypothetical title, upon the plaintiff's *information* and *belief* that a settlement was executed." It is to be borne in mind, that the grounds of defendant's information and belief were set forth and his belief sworn to. His lordship, however, proceeded and said: "There is no instance of an injunction in such a case. An affidavit to *information* and *belief* is nothing in this sort of case."

In *Everly v. Rice*, 3 Green Ch. R., 553, the chancellor says, referring to the answer in that case: "In common charity it is to be presumed that this general denial relates to a written agreement or deed which is not alleged in the bill, or else that it is predicated of the defendant's *information* and *belief*, which is not sufficient. The defendant must answer upon his *own knowledge*, and not upon *information* and *belief*, otherwise the injunction must be retained till the final hearing."

Nor is this well-settled principle affected by the inability of a defendant to make a fuller denial; for the reasons given for the existence of it are unaffected by the inability of a defendant to make a fuller denial; and for the simple reason that the existence of the fact alleged by complainant is unaffected by the ignorance of the defendant of its existence or the sincerity of his belief in its non-existence.

In *Roberts v. Anderson*, 2 Johns. Ch. 202, the bill prayed

for an injunction staying all proceedings on a judgment in ejectment which had been obtained against the complainant. Chancellor Kent stated, "The only point is, whether the two deeds from Griffith to Sarah Johnson, under whom the defendants set up title, were fraudulent and void. The question of fraud was not tried; and from the history of the ejectment suit, as stated in the pleadings, it would seem that it could not be tried, as the recovery was placed entirely on the ground that the defendant at law was tenant to the new defendants, and so concluded from setting up this defense. But the fraud as charged is a proper and familiar head of equity jurisdiction, and unless the answer be full and satisfactory, the injunction, if right in the first instance, ought to be retained until the hearing. All the denial contained in the answer is that the defendants were not privy to any fraud, and were *bona fide* purchasers under a judgment and execution against Sarah Johnson. If she had no title they had none, and they aver that they *believe* her title was good, because they do not know or *believe* that the conveyances from Griffith to her were fraudulent. This is leaving the question of fraud as unsettled as before the answer came in.

"It is true the defendants may have given all the denial in their power; but the fraud may exist notwithstanding, and consistently with their ignorance of the sincerity of their belief. In some particular cases the court will continue an injunction though the defendant has *fully* answered the equity set up."

In the case of *Everly v. Rice*, the following is cited from the language of Chancellor Williamson, in the case of *Kinnerman v. Henry*. "I do not consider," said he, "the fraud in this case as sufficiently denied to entitle the defendant to a dissolution of the injunction upon the ground of the whole equity of the bill being denied. The defendants are not charged with being parties or privy to the fraud;" nor were they so. In relation to them the chancellor says, "All they could do, or which they have done, is to deny all *knowledge* or *belief* of the alleged fraud. The answer may be perfectly true and yet Johnson, the mortgagor, guilty of the fraud imputed to him, and the complainant entitled to relief against these defendants. Such an answer is not sufficient denial of

the complainant's equity to entitle the defendants to a dissolution of the injunction."

We will now submit to the principles enunciated in the foregoing authorities, the denials of the answer in this case. One allegation in the bill and one of the most material is direct and positive. It enumerates sundry documents constituting a part of the documentary title of defendants and expressly charges that all and singular said documents in relation to said Castillero's claim to said tract of land and cinna-bar mine are *false, fraudulent, antedated and forged*, and they have all and singular been fraudulently contrived and fabricated since the right of property and possession to the said land and mine accrued to complainants, with intent to cheat and defraud the United States out of the property and possession of said land and mine.

The denial of the defendants as to the forgery of the documents is to be found in section fourteenth of the answer. They say that they have no personal knowledge of anything said or done by the said Castillero in or about his said representations to the Alcalde Pico, as shown in his letters, copies of which are exhibited in exhibits "A" and "B;" neither have they any personal knowledge of what was said or done by the said Alcalde, when he gave the said Castillero possession of the mine and lands around it, which was evidenced by the written instrument, a copy of which is exhibited, marked "Exhibit E;" nor have they any personal knowledge of what was said or done by Castillero or the Mexican authorities in and about the business which resulted in the proposals, contracts, grants and official correspondence and reports which appear and are shown in the exhibits annexed to this answer, being "Exhibits G, H, J, K, L, M, N;" but they have been *informed and believe* that the said documents are perfectly genuine and fair, and express truly the matters and things to which they relate and were made at the times of their respective dates.

Having stated their want of personal knowledge of the facts covered by said documents, in the fifteenth section of the answer, the defendants aver that to the best of their knowledge, information and belief Castillero did present to said Alcalde Pico the two original letters, copies of which are

hereto annexed, marked "Exhibit A and B," and that said letters were written on their respective dates; and said Pico did put the said Castellero in possession of the mine and of three thousand varas of land in all directions measured from the mouth of the said mine, in the month of December, 1845, and that all the matters of fact recited and described in the said instrument signed by Pico, Alcalde, and by Antonio Suñol and José Noriega, attesting witnesses, a copy of which is shown in "Exhibit E," are truly recited therein; and in the same section, the defendants Halleck and Barron say, and the defendants, Parrott, Bolton and Young believe it to be true, that they (the said Halleck and Barron) have conversed with the said Pico, the Alcalde, with the said Antonio Suñol, and with José Fernandez, who, in the month of December, 1845, was a clerk in the office of Pico, Alcalde, who was present on the ground at the old mouth of the mine when the said possession was given, and also with other persons who lived in and about the pueblo of San José in 1845 and 1846, and who knew of the possession of said mine by Castellero as a matter of general notoriety; and from all the knowledge and information obtained from these and other various and authentic sources, which information was positive and precise, the defendants are convinced and believe that the possession of the mine, and of three thousand varas of land measured in all directions from the then mouth of the mine, was given by the said Alcalde Pico to the said Castellero, in the month of December, A. D. 1845, as set forth in "Exhibit E." And this section concludes with the averment that to "the best of their knowledge, information, and belief," all the acts and things which are described and mentioned in the original documents, of which the "Exhibits G, H, I, K, L, M, N," and "O," are copies, did really take place, as they are therein set forth, and at the times therein specified, and that all the said documents are genuine, and were made at the times shown in their respective dates.

In the sixteenth section of the answer, William E. Barron avers, and the defendants, Halleck, Young, Parrott and Bolton believe it to be true, that in the month of May, in the present year, he (the said William E. Barron) was *informed* by Segura, that he, Segura, was, in 1846, president of the "Junta de

Fomento," that his signature to the various "Exhibits," when shown to him, were genuine, and also declared that all the titles were signed by the persons who purport to sign them, and received by him; and a detailed statement by him is made of the facts connected with the acts of the said Segura in connection with the title of Castellero.

In the seventeenth section of the answer a similar course is pursued, the difference being in the character of the facts communicated to Mr. Barron, and his informant on this occasion being Mannel Conto, Secretary of "El Fondo de Minería."

In the eighteenth section of the answer a similar statement is made; the only difference being in the character of the facts narrated, being detailed by a different person, José Maria Duran, who stated he was chief clerk of the ministry of justice, under Becerra.

In the nineteenth section of the answer, similar statements of facts are made upon the information of Castillo Lanzas, who was a Mexican official in 1846.

In the twentieth section, the information was received by Mr. Barron from one Blas Balcarcel, who in 1846 was prefect of the National College of Mining in Mexico.

In the twenty-first section of the answer, it is averred that Barron, while he was in Mexico, inquired in the various offices of the government, and found many persons who remembered when Castellero was in Mexico in 1846, and that it was *reported* and *believed* that he discovered a quicksilver mine in California, and that he was then engaged in making some contract with government in relation to the same; and from all the said Barron could learn, he is perfectly convinced that all the matters and things spoken of in the documents, copies of which appear in the said Exhibits G, H, I, K, L, M and N, are truly related in said documents, and that all the said documents are genuine, and were made at the time they purport by their dates to have been made.

In the twentieth section of the answer, all the defendants unite in the averment that they *believe* in the entire truth of all the *information* received as aforesaid by the said Barron, and from all said *information*, and from other sources of *information*, that all the matters and things spoken of in the

documents, copies of which appear in the said Exhibits G, H, I, K, L, M and N, are truly related in said documents, and that all the said documents are genuine, and were made as they purport to have been made by their dates.

The last section which alludes to that part of the bill which charges forgery and antedating, is the twenty-third, which denies generally the charges, and particularly denies that any of the documents, copies of which are shown in the Exhibits A, B, E, G, H, I, K, L, M, N and O, are false, or fraudulent, or antedated, or forged, etc.

Most of that portion of the answer which responds to the allegations of forgery and antedating of the muniments of defendant's title, is given literally, and all substantially set out. It is matter elaborate and argumentative, but does not constitute positive and distinct denials, which the law requires in an answer in response to the material allegations in a bill, in order to influence the action of the court on a motion for an injunction in a case of irreparable mischief, or destructive trespass. The insertion in an answer of such denials merely, in the language of Judge Story, puts them in a train for contestation and proof by the other side: 3 Sumner, 77.

The averment of the genuineness of the documents alleged by the bill to be forged and antedated, is founded entirely on "*information and belief*," and on deductions from facts of which defendants were informed. In the fourteenth section of the answer they say they have no personal knowledge of anything said or done by Castellero in his representations to the Alcalde Pico, as shown in his letters; that they have no personal knowledge of what was said or done by the Alcalde when he gave the possession of said mine to Castellero, evidenced by "Exhibit E;" nor any personal knowledge of what was said or done by Castellero or the Mexican authorities about the business which resulted in the documents, grants, etc., which are shown in the "Exhibits G, H, I, K, L, M, N;" but they say they have been *informed* and *believe* that said documents are perfectly genuine and express truly the matters and things to which they relate. The allegation in the bill is positive, and charges that these very documents, or rather their supposed originals, were fraudulent, forged, and antedated.

The denial is that the defendants have no personal knowledge of the facts exhibited in the documents, but they have been *informed* and they *believe* the documents to be perfectly genuine, express truly the matters and things which they relate, and that they were made at the times of their respective dates. Can such denial be deemed clear, direct and positive? They do not pretend to have seen the originals; they disavow all personal knowledge of the facts to which they relate. Their belief as to the genuineness of the documents is founded on the information they received that they were genuine; and upon the authenticity of that information they found their belief of the genuineness of the facts of which they relate, of which themselves are in no other way cognizant.

Every word they have uttered may be strictly true. Their belief may be sincere, they undoubtedly may have received such information, and yet the documents may have been fabricated as alleged, without imputation of false swearing. Hence the well settled rule that the denial in an answer must be direct and founded on personal knowledge before the court can act upon them in a case of irreparable mischief, and the issue of an injunction to enjoin the same.

It is due to the defendants in this case to say, they have frankly disclosed the sources of their belief and sworn only to it. They have not placed themselves in the position of parties described by C. J. Marshall in *Clark's Ex. v. Riemsdyk*, 9 Cranch, 160. The strength of their belief has not betrayed them into a mode of expression of which they were not apprised. That when they intended to utter only a strong conviction of the existence of a particular fact, or what they deemed an infallible deduction from the facts known to them, they may assert that fact or that deduction in terms which convey the idea of their knowing the fact itself. In this case, the defendants tell us, they have no personal knowledge of the transactions; that they were informed the documents were genuine, and acting on that information, they swear to their belief of the existence of the facts to which they relate.

It may be urged, they could not truly make a fuller answer in the nature of things. This is true; and if the question was, whether such denials be sufficient to raise the issues for trial on the final hearing, and impose upon the complainants the

duty of meeting them by proof, there could be no doubt that the pleading would be sufficient for that purpose. That defendants are unable to answer more fully, is not their fault; but the rights of complainants can not be prejudiced, for it certainly is not their fault. The defendants are in the precise position of all other parties who are called on in a case like the present, to answer an alleged simulation of the title by those under whom they claim. Chancellor Kent only affirms the well settled doctrine, when he says, "It is true, the defendants may have given all the denial in their power; but the fraud may exist notwithstanding, and consistently with their ignorance, or the sincerity of their belief." *Roberts v. Anderson*, 2 Johns. Ch. 202.

In ascertaining the sufficiency of the denials in the answer, it is necessary to refer to some other allegations in the bill. The twenty-eighth article of the bill charges that all the pretended proceedings before the said Alcalde Pico, in respect to the judicial possession of the mine, and all the pretended proceedings of the government of Mexico, were falsely and fraudulently made, contrived, procured, antedated and forged, in pursuance of the aforesaid fraudulent conspiracy against the United States, and with intent to defraud the United States out of said mine and minerals, or some part thereof, under false, forged, and antedated Mexican titles. The bill further charges that in pursuance of said conspiracy letters were written and communications and memorandums made between the said Alexander Forbes and his confederates, and the said J. Alexander Forbes, as their agent (copies of which are herewith filed as exhibits, marked "B, C. D" and "E," and made part of the bill), in and about the fabrication and procuring the aforesaid false, antedated and forged Mexican titles, etc. To these charges they reply in the thirty-second section of the answer, and the defendants admit the correspondence embraced in said exhibits to have been written by the parties to them, at the times they bear dates respectively and at the places from which they purport to be written, except the letter dated 25th March, 1848, which they aver to have been forged. They do not deny that J. Alexander Forbes was acting in behalf of, or as agent of the parties, but they deny "that said letters and communications were written by the said parties with an intent

to commit a fraud in furtherance of a conspiracy to fabricate a title, as charged in said bill, except so far as appears from said letters on the part of the said James Alexander Forbes."

They neither deny nor admit such intention on his part; but refer to the correspondence for the ascertainment of the fact whether or not a person under whom some of the defendants claim title, was guilty of the charges of conspiracy and intention to cheat, as alleged in the bill.

Such denials of material allegations of the bill in the answer, though sufficient, for the purpose of pleading, to place the issues raised in a train for contestation, are not sufficient to enable the court to act upon the documents as proved and to refuse the injunction on that ground.

We have discussed this motion on the allegations of the bill and the denials of the answer, as all affidavits as to title have, in my opinion, been excluded by the well-settled rules of courts of equity, a rule affirmed by this court in the case of *Tobin v. Walkinshaw*, McAll. 186. Judge Story has, as we have seen, expressed strong doubts of the propriety of the rule, and as an extended discussion has been made by the respective counsel in relation to title, it is deemed proper to look to the facts elicited by the affidavits, and to inquire into the allegations of forgery and antedating made against the documentary title set up by defendants, with a view not to decide upon or establish title, a matter within the exclusive jurisdiction of another tribunal, but to ascertain whether the facts and the testimony bearing upon the allegations of fraud forgery, and antedating, be such as to satisfy the court that there is reasonable foundation for the plaintiff's title, which would entitle them to protection from irreparable mischief in the event that such title should turn out to be well founded. My associate will give his views upon that point.

Mining as an Irreparable Injury.

The remaining inquiry is, does the present case come within the range of cases in which courts of equity have exercised the powers now invoked? A response to this question will be found by reference to a few decided cases, in addition to authorities incidentally alluded to while commenting upon the objections urged by the solicitors for defendants.

It is proper to observe that the court on this motion is not to try title. The determination of that question belongs exclusively to another tribunal. All that we have to do in relation to title is to look to the allegations of the bill and the denials in the answer, and ascertain from them whether the plaintiff's title, in the language of Mr. Justice Story, "has such a probable foundation, in the present stage of the cause, as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing it should turn out to be well founded." 3 Sumner, 77. To this, the court will limit its remarks.

In *Lloyd v. Passingham*, 16 Vesey, 59, a receiver and injunction were refused where defendant was in possession, but where the legal estate was charged to have been obtained through forged documents. The action of the court did not turn upon a want of power in the court, but upon the special circumstances of the case. The grounds on which the court decided will instruct us as to the principles on which a court of equity acts in cases analogous to the present. In that case, the defendants had recovered, by ejectment, certain estates. This occurred some fourteen years prior to the suit in equity. The latter was a bill filed to impeach the verdict in ejectment, principally as obtained upon forged entries of burial and death, contrived by Robert Passingham. The bill prayed for an injunction to enjoin the cutting of timber and other waste, and for a receiver. The case was argued on affidavits. Lord Eldon refused the application on three grounds: 1. Because the trial in ejectment had been had upon other testimony than the entries which were alleged to have been forged. 2. Because doubts were thrown upon the affidavits charging the forgery, on account of contradictions as to time and circumstances, which made the act of forgery, if done, a remarkable one; and 3. Because no danger as to the rents was suggested. His lordship looked to the additional circumstance, that the defendants would be made illegitimate, provided the testimony should bear out the affidavits.

It was under foregoing circumstances, where the defendants held the legal title and a judgment in ejectment obtained by them fourteen years previously, when the judgment had been obtained on other testimony besides the alleged forged docu-

ments, where the evidence as to the forgery was contradicted and where there was no irreparable mischief, for *none such was suggested*, that Lord Eldon refused the motion and concluded with these words, "Whatever may be the ultimate event of this suit, to which my act this day, refusing this application, will be no prejudice, I do not consider that these circumstances form that extreme case in which the possession is to be taken from those who have the legal title." 16 Vesey, 72. Nothing is said of want of power in the court; a perfect legal title was in defendants, held under a judgment for fourteen years, accompanied by possession. The judgment was obtained on other testimony besides the documents alleged to be forged, the testimony as to forgery contradictory; and, above all, irreparable injury not even suggested; and yet his lordship in deciding against the motion bases his decision to a considerable extent on the last ground—that *refusing the application will be of no prejudice.*"

In his opinion the chancellor expressly says, "I give no opinion upon the application for an injunction against committing waste." This language was used by him in view of the fact, that he did not view the case as one of irreparable mischief.

This case not only establishes the power of the court, but no notice was taken of the fact that there was no suit at law pending at the time.

In the case of *Guerard v. Geddes*, 1 McCord Ch. 304, no suit at law was pending, and the court in its opinion was discussing the power of a court of equity to interfere by injunction in a case of trespass.

They overruled the decision of the court below ordering an injunction to issue to restrain the defendant from obstructing a right of private way; and they, at the same time, place the doctrine on its true ground, that of irreparable injury. They consider a temporary obstruction of a private road, and similar trespasses, as not cognizable in equity.

The decision in this case enunciates the true rule. It is the *irreparable mischief* which is to govern. A party may complain of what may be deemed technically a nuisance or waste; but the true question remains, is the act complained of one of *irreparable mischief*. The court in the above case say, that the nuisance complained of must be productive of irreparable

injury: 1 McCord Ch. 309. In reference to trespasses which are not attended by such mischief and an adequate remedy can be obtained at law, they say, such cases do not require the aid of a court of equity, and certainly not until the right has been determined at law: *Ibid*.

Upon the nature and character of the injury complained of, depends to a considerable extent the jurisdiction of this court. Is it irreparable?

Irreparable injury is such as can not be estimated with accuracy in money, or where it is so great that the party committing it can not make a compensation, or where from its nature the injured party can not be made whole. Such for instance, as the destruction of the substance of the thing.

The property sought to be protected is mineral land, and a mine of great value. The acts which defendants are committing and intend to commit, are such as the law adjudges to be waste. This point is settled by the case of the *United States v. Gear*, 3 Howard, 120; and also by the Supreme Court of this State.

In the case of the *Merced Mining Company v. Fremont*, 7 Cal. 321, it is said, "The ground upon which the injunction was granted in these cases of timber, coals, ores and quarries was, that the trespasser, in the language of Lord Eldon, was 'taking away the very substance of the estate.'"

"It must be conceded that the principles of these cases apply to gold mines as well as to others. In fact, there are circumstances connected with gold mines (and the remarks apply equally to quicksilver mines) that render the remedy by injunction more appropriate than to other mines. The only value of a gold-mining claim, in most cases, consists in the mineral. If a party removes the gold, he removes all that is of any value in the estate itself. It is emphatically taking away the entire substance of the estate."

After affirming the rule, that facts to show that the injury is irreparable must be stated in the complaint, the court proceeds, "But in the cases of mines, timber and quarries, the statement of the injury is sufficient. In the nature of the case all the party could well state as matter of fact, is the destruction of the timber in the one case, and the taking away the minerals in the other. Taking away the minerals is itself

the injury that is irreparable; because, it is the taking away the substance of the estate.

Insolvency.

The allegation of insolvency is not necessary to procure the injunction in these cases. The right to the remedy is based upon the nature of the injury, and not upon the incapacity of the party to respond in damages."

In the opinion of this court, mere insolvency, if the amount is inconsiderable, would not give jurisdiction to a court; but where the amount is great, and the inability to respond is greatly disproportioned to that amount, such insolvency would be an element which would certainly influence the action of a court; and where it exists is a proper subject for an allegation in the bill.

U. S. Title under Guadalupe Hidalgo.

Having disposed of the question relative to the power of the court, and the irreparable character of the injury complained of, we come to the consideration of another point:

Have the complainants such a right in the premises as entitles them to an injunction to protect them until the litigation pending as to their title shall be determined?

That the United States, by the Treaty of Guadalupe Hidalgo, acquired the legal and paramount title, seems not to be denied. That no legal title can vest in defendants until the confirmation of their claim, under the act of the 3d March, 1851, is clear: 2 Howard, 316. But it is contended that the Congress of the United States have dedicated the minerals in the lands of California to the public.

The grounds on which this proposition is placed by defendants' solicitors are:

1st. The United States by their general policy, and the direct concurrence of the executive branch of the government, have encouraged the working of mines and the employment of mining capital in California.

2d. The State has done the same by express legislation; and all the departments of the State government have concurred in establishing mining operations in the State on public land as the paramount interest of the State, to which all other industrial branches are subservient.

We shall not pause to inquire into the legislation of this State in relation to minerals on the public lands of the United States. One thing is certain, that neither her policy nor legislation, however much they may influence the action of the legislature of the Union, can deprive the United States of any legal right, or influence the action of this court in this case. That has been guarded against in the act of Congress passed 9th September, 1850 (9 U. S. Statutes, 452), entitled "An act for the admission of the State of California into the Union." In that act it is expressly provided, "that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits; and shall pass no law, and do no act, whereby the title of the United States to and right to dispose of the same, shall be impaired or questioned."

As to the ground that the Congress of the United States have dedicated the minerals to the public, and hence there is no equity in this bill, it is difficult to perceive, if such dedication had been made, how it could affect in any way the equity of the present claim. Suppose it to be the fact, how can it affect the rights of defendants' private claim? If such dedication does authorize the occupancy of the public lands, and permit persons who occupy them to dig the minerals in conformity with State laws, can the acquiescence of the general government in their so doing, aid legally or equitably the title of defendants, who do not claim under that permission, but claim to have an adverse and exclusive right to the property as against the United States and all the world?

The claim of these defendants of the exclusive ownership of the mine, is inconsistent with the title they attempt to set up, under the dedication by Congress of the minerals to the public. They can not in the same breath set up a superior adverse title, and also a right to work the mine by reason of a dedication of the minerals to the public.

Congress has never parted with the right (reserved as we have seen by the act admitting this State into the Union) of disposing of the public mineral lands. They have merely exempted them from the general land laws, and have omitted to legislate in regard to them except to exempt them from pre-emption rights, by the act of 3d March, 1853.

They can at any moment dispose of them. The defendants did not enter upon the premises by virtue of any tacit or implied permission and license, but adversely as owners, and claim the lands as theirs, whatever disposition the United States may make with regard to the public mineral lands. If relying upon such permission to all persons to enter upon, and work mineral lands, defendants had entered, it might be a sufficient answer to a bill for an account of profits during the time such permission continued. But defendants did not enter, nor do they claim under such license, but adversely as owners.

The United States having the title to the mine, the court can not say that they have lost their rights, because, with regard to other minerals, they have not asserted them.

Congress, to whom alone, under the constitution of the United States, regulations for the disposal of public property is confided, have, so far as their action goes, manifested their determination to relinquish no right to any public land in California. Having protected, in the act admitting the State into the Union, their title to the public lands, so far as the State was concerned, they proceeded to guard that title from individual claimants.

The treaty of Guadalupe Hidalgo addressed itself to the political department; and up to the passing of the act of 3d March, 1851, that department alone had power to perfect titles and administer equities to claimants: 13 Howard, 260. Congress, in the fulfillment of its treaty obligations, passed that act entitled "An act to ascertain and settle the private land claims in the State of California."

It is an established principle of jurisprudence in all civilized nations, that the sovereign can not be sued in its own courts, or in any other without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it: *Beers v. State of Arkansas*, 20 Howard, 527.

Under this power, the political department transferred, by the act of 3d March, 1851, the power of perfecting titles and administering equities to individual claimants.

Aware that many claims would be made under Mexican titles, some legal, others equitable and inchoate, and others fraudulent, and with a view to segregate all lands of individual claimants from the public domain, Congress passed the act in question. Desirous to fulfill in a liberal spirit the treaty obligations of the government, they imparted to the tribunals to which the jurisdiction was committed, rules of decision different from those which obtained in the ordinary judicial tribunals of the country. This extended range of principles was made their rule of action, to effect what Congress purposed they should; that is, to enable them to confirm a large number of claims which were inchoate, and being no evidence of legal title, presented inchoate and equitable rights, commending themselves to courts regulated as those tribunals were by the "principles of equity which could not be enforced by the ordinary judicial tribunals."

We consider it evident that the United States have a title and interest in the premises in dispute, and have a clear right in a proper case to invoke the interposition of a court of equity to protect the property until the title to it is ascertained in the manner prescribed by law—whether it be public land or not. One of the terms on which the United States consented to be sued is prescribed in the 13th section of the act; which enacts that all lands the claims to which have been finally rejected by the commissioners, or which shall be decided to be invalid by the District or Supreme Court, shall be deemed, held, and considered as part of the public domain of the United States: Dunlop's U. S. Laws, 1296.

Action at Law Pending.

The fact is admitted by the pleadings in this case that a petition is pending in behalf of defendants, in the name of one Andres Castillero, in the district court, on appeal from the commissioners, having for its object a confirmation of the title to these premises. The result of a decision in one way will be to segregate the premises from the public domain; and they will not be segregated until such decision is made. A contrary

decision will leave the property in the hands of complainants. Can it be successfully asserted that the United States have no such interest in the mine as will authorize a court of equity to protect the property while that issue is pending?

We consider the legal title to this property to be in the United States, until it is decided to be private property. But suppose it be assumed that the interest held by the United States is to be confined to what they hold under the act of 3d March, 1851. If such assumption be made, it may be contended that, so limited, it is a mere contingent interest, and not to be protected by the court,—that it is not a vested interest. The answer to such suggestion is, that the right or interest of defendants is equally contingent; and again, that the right of complainants, if it be admitted to be contingent, will not deprive it of protection from a court of equity in a proper case.

The court will grant an injunction when the aggrieved party has only equitable rights. Thus in cases of mortgages, if the mortgagee or mortgagor in possession commits waste, or threatens to commit it, an injunction will be granted. So where there is a contingent estate on an executory devise dependent over upon a legal estate, courts of equity will not permit waste to be done to the injury of the estate. In case of a mortgagee filing a bill to stay waste by the mortgagor in possession, the court will interpose, although the right of the mortgagee in the land or its proceeds is contingent upon his recovery of the debt, to secure payment of which the mortgage was given. In *Camp v. Bates*, 11 Conn. 51, a bill was filed to enjoin waste upon property on which complainant held a lien as an attaching creditor, under a law of the State. It was admitted that by the attachment the party acquired no legal title to the property, and that he might never obtain one. The court say, it has been urged that the “plaintiff had neither an equitable nor a legal title. That he had no interest in the estate, none which a court of equity would consider a vested interest;” and the court proceeds to inquire into the right of the party, and coming to the conclusion that the attachment, when completed, would bind the estate under the provisions of the law, say, “We are not, then, to speculate as to the result whether the creditor will recover at all, or recover the full sum he demands.

The estate attached is to be held subject to meet that recovery, be it more or less. The question then arises, does the law give this privilege and then leave the debtor to take it away or destroy it? Does the law give a privilege and allow the party against whom it is given to render it useless? Is a court so utterly impotent, or is it so fettered by its own rules, that this may be done and the court have no power to prevent it? Did not the plaintiff, by his levy, acquire this sanction of the law that the property should stand pledged to await his judgment? Had he not, then, a right acquired by this lien, a right which a court of justice is bound to respect and defend? It is not indeed a legal interest, which would pass by a release deed; but it is a right not less sacred, and no less regarded by a court of law."

The fact, then, that the interest of the complainants under the act of Congress of 3d March, 1851, is made contingent, does not defeat their right to the protection of the court. We have referred to this last case, to show that the submission by the United States of their title to a contingency, does not affect injuriously the present application.

Ore Already Severed.

The bill in this case prays for an injunction to stay future waste, and also that the action of the court may extend to the preservation of the ore and materials now upon said mine and land, and all the quicksilver extracted from the ore of said mine in the possession of said defendants. It is urged that injunction is not granted in restraint of the removal of that which has been disconnected with the realty and assumed the shape of chattels.

In the case of *Watson v. Hunter*, 5 Johns. Ch. 169, the principle affirmed is that in *ordinary* cases, where no special circumstances intervene, injunction will not be issued to prevent the removal of timber already cut. Chancellor Kent concludes his opinion by saying, "I do not mean to be understood to say that the court will never interfere, but that it ought not to be done in ordinary cases like the present."

In *Winship v. Pitts*, 3 Paige, 259, 261, it is said: In ordinary cases, the account for waste already committed is merely incidental to the relief by injunction against future waste,

and is directed to prevent a multiplicity of suits. The rule, however, is general, that although the recovery of damages for waste is not a substantial ground for a bill in equity, yet if the court has jurisdiction of the subject upon any other ground, it will decree an account of the waste committed: 1 Lead. Cases in Equity, 554.

In *Backler v. Farrow*, 2 Hill (So. Car.) 111, the court asserts the general rule to be, that damages for waste can not be recovered, the remedy being at law; but they say: "But, having proper jurisdiction of the case, there is hardly any question in relation to property which this court may not determine incidentally, for the purpose of doing complete justice and preventing multiplicity of litigation." The rule as laid down in the case of *Jesus College v. Bloom*, 3 Atk. 262, Ambler, 54, is that a bill will not lie for waste merely, but if the party be properly in court for another purpose, as to obtain an injunction, then an account of past waste will be granted. "There are many cases where this court have made decrees in the cases of mines which they could not have done in the cases of timber. There is no question that the court was in possession of this case, and incident to it was the accounts for rents and profits and the account for waste."

Where an injunction against waste is granted, if the complainant has a claim in law to satisfy for the value of the timber or other matters, the removal of which constitutes the waste, he is entitled to an account as of course, as incident to the injunction and to prevent multiplicity of suits: 1 Lead. Cases in Equity, 554. Now, the removal of large amounts of minerals constitutes waste. The result of the doctrine furnished by the authorities is, that in an ordinary case an injunction will not be issued to operate upon past waste; but that in cases where the court has original jurisdiction of the case, and the party is properly in court for some other purpose—for instance, to obtain an injunction, or where there is the allegation of fraud, or where the removal constitutes a part of the waste, the court may extend its protection to past waste. That the cases which constitute exceptions to the rule which applies to ordinary cases are those where the profits of mines and the opening of mines is the waste complained of.

To this point is the case of *Jesus College v. Bloom*, Amb.

56, where the court, referring to an authority cited, say: "The more probable reason for decreeing an account in that case seems to be because it was the case of mines; and the court always distinguishes between digging of mines and cutting of timber, because the digging of mines is a sort of trade; and there are many cases where this court will relieve and decree an account of ore taken when in any other tort or wrong done it has refused relief."

We consider this case not to be the ordinary one of cutting timber, but the working of a valuable mine, and that the injunction in this case should extend to ore extracted, and remaining on the premises, as well as to future waste.

Conclusions.

A careful examination of this case has brought the court to the following conclusions: That the complainants have exhibited a title to the premises in dispute, which entitles them to an injunction to stay waste upon it; that the character of the waste complained of is what the law deems irreparable mischief; that the allegations of the bill charging forgery, fraud, and antedating upon the documentary title under which defendants claim, have only been denied "on information and belief," which will not authorize the court to consider the allegations in the bill on this motion as disproved; and lastly, that the facts as shown by the exhibits annexed to the pleadings, and the affidavits filed, if they are to be considered, do not set forth circumstances showing good faith, which, according to Mr. Justice Woodbury, in *Parker v. Wood*, 1 Wood. & Minot, 281, must accompany "a general denial" of plaintiff's title in order to make it sufficient.

The court, therefore, are constrained by a "judicial necessity," to grant the injunction prayed for.

The injunction will be temporary, subject to the further order of the court. It is not to be anticipated that either party will interpose any obstacle to the prompt determination of the issue as to the title to the premises now pending. But it is deemed proper to keep this injunction under the control of the court, so that it may be able to do what subsequent events may require.

The bill prays that a proper person or persons may be ap-

pointed receivers of the said tract of land, mine, and minerals, take possession of the same, with the appurtenances, receive the profits of same, and all the ore of said mine, and the quicksilver extracted therefrom, and to lease, work and manage the said mine, and receive the rents, issues and profits thereof, and the ore and quicksilver to said mine or elsewhere in the defendant's possession, that has been extracted from said ore; to make sale and disposition thereof, to be accounted for under the order of this court. The court do not consider that the appointment of receivers with such extreme powers is, at this time, necessary.

The ground on which the court has felt it to be its duty to interpose by injunction in this case, is to preserve the premises from waste and destruction, while the title to it is undecided. It has also considered it its duty to enjoin against the removal of the ores which have been already extracted, and remain on the premises. Every object contemplated by the bill, and which the court desires to effect, would seem to be attained by enjoining the further working of the mine, and the reduction and carrying off the ores now on the premises. Unless those ores are liable to deterioration, from natural causes or by being plundered, there is no necessity to appoint a receiver. If, however, it be made to appear that the condition of those ores is from any cause insecure, or other circumstance which may call for further interposition, the court will take into consideration an application for the appointment of a receiver.

An injunction, in accordance with the prayer of the bill, and in conformity with the views herein expressed, will be submitted by the solicitors for complainants to the court.

Concurring Opinion stating the Facts of the Contention.

HOFFMAN, Dist. J.

In the opinion just read, this case has been considered on the allegations of the bill and answer alone, excluding all affidavits on either side relating to title.

It has been seen, however, that in the opinion of Judge Story, the court, to prevent irreparable mischief, may look to "affidavits in affirmance of the plaintiff's title, not so much

with a view to establish that title, but to see whether it has such a probable foundation in the present stage as to entitle the plaintiff to be protected against irreparable mischief, if upon the hearing of the cause it should turn out to be well founded." *Poor v. Carleton*, 3 Sumner, 81.

Had no answer been filed, it is clear that the court, as in the case of *Lloyd v. Passingham*, 16 Vesey, 59, and in that of *Perry v. Parker*, 1 Wood. & Minot, 281, relied on by the defendants, might have heard the motion on affidavits filed on both sides.

Unwilling to rest the decision of the motion upon what may seem a technical and rigorous rule, and on allegations in the bill which are assumed to be true merely because not met by a positive denial in the answer, we have looked into the affidavits on either side with a view of ascertaining whether the complainants, assuming such an inquiry to be admissible, have made out such a *prima facie* or probable case as will warrant the interference of the court in this preliminary stage of the cause.

That the court will interfere to prevent the destruction of the estate or fund, even though the title is disputed, has already been abundantly shown. That it will so interfere against a party in possession, and even against such a party having the legal estate, is also clear. The inquiry arises, what must be the nature or force of the evidence which the court will exact before it exercises this authority?

It is admitted in the case of *Perry v. Parker* that a mere denial of plaintiff's title, without any evidence to show the denial to be made probably in good faith and to be sustained by something of fact and law, is not sufficient.

In Daniell's Ch. Pr., p. 2027, it is said, "The court will appoint a receiver against a party having possession under a *legal title*, if it can be satisfied that such party is wrongfully entitled to such legal estate."

Where the right to the possession is in dispute, the court will, if it sees clearly that the plaintiff has the right, and that the ultimate decree will be in his favor, appoint a receiver pending the suit. *Id.*, p. 2026.

It might be inferred from these authorities that the court will in no case interfere against a party in possession, unless on evidence sufficient to satisfy it that he has no title.

Such, however, we do not conceive to be law. The extracts from Daniell's Practice, above cited, refer to cases where the property is in possession of a party having the legal estate. In such cases much reluctance is undoubtedly felt by courts of equity to interfere by injunction.

But even in such cases, the case of *Lloyd v. Passingham* impliedly sanctions the doctrine that where there is danger to the substance of the inheritance, and the damage apprehended is great and irreparable, the court will not confine its interposition to those cases alone where it can declare itself satisfied that the defendant has no title.

In the case of *Perry v. Parker* it does not appear that any irreparable injury was apprehended; and even in that case the court enters into an elaborate examination of the titles of plaintiff and defendant with an evident inclination to the opinion that the former is more than doubtful.

Daniell, on the page succeeding that on which the last citation is found, states that though the court will not interfere on the mere ground of title, it will appoint a receiver at the instance of parties beneficially interested, even where there is no fraud or spoliation, provided it can be satisfactorily established that there is danger to the estate or fund, unless such a step is taken.

In the case of *Poor v. Carleton*, Judge Story says, "The true rule seems to me to be, that the question of dissolution of a special injunction is one which, after the answer (denying the whole merits of the bill) comes in, is addressed to the sound discretion of the court. In ordinary cases the dissolution ought to be ordered because the plaintiff has *prima facie* repelled the whole merits of the claim asserted in the bill. But extraordinary circumstances may exist, which will not only justify but demand the continuation of the special injunction. This, upon the principles of a court of equity, which will always act to prevent irreparable mischiefs and general inconvenience in the administration of justice, ought to be the practical doctrine; and I am not satisfied that the authorities properly considered establish a contrary doctrine." And this, says Judge Story, seems to have been the course which commended itself to the mind of that great equity judge, Chancellor Kent: *Poor v. Carleton*, 3 Sumner, 76-82.

We think that the opinion of Judge Story, above cited, is sufficient authority for the position that in cases, like the present, of irreparable mischief, the court in examining the affidavits, assuming them to be admissible, will inquire whether the title of the plaintiff has such a probable foundation as to entitle him to be protected during the litigation by which it will finally be determined. And that in cases of threatened waste and destruction of the estate, where the apprehended injury is great and irreparable, as also in cases of the threatened destruction of heirlooms, works of art, etc., the court, in the exercise of a sound discretion, should interfere even in doubtful cases to preserve the parties in *statu quo* until the right can be determined.

We will therefore examine to some extent the evidence which has been adduced on either side, and which has been so largely discussed at the bar, in order to see whether the complainant's title appears to have such a probable foundation, and the allegations of the bill are sustained by such proof, as to warrant the court in interposing to protect the estate until the determination of the right.

The title set up by the defendants consists of an alleged mining right or title, originally acquired by denouncement and registry under the mining laws of Mexico; and secondly, an alleged concession of two *sitios de ganado mayor*, made by the supreme government of Mexico.

The evidence of the mining right or title is in the form of an *expediente* or record, consisting of two letters of Andres Castillero, addressed to Antonio Maria Pico, Alcalde, and an act of possession purporting to be executed by that officer, in which he recites that he has given possession of the mine and of three thousand varas of land in every direction, to Castillero.

The evidence of the two-league grant consists of a dispatch from Castillo Lanzas, Minister of Exterior Relations of Mexico, addressed to the governor of California, but produced by the defendants.

In this dispatch a communication to Lanzas from the minister of justice, is set forth. In that communication the minister of justice transcribes a communication addressed by himself to Segura, President of the Junta for the Encouragement

But all these documents are in the bill charged to be fraudulent and antedated.

The evidence chiefly relied on in support of this allegation, is contained in a correspondence attached as an exhibit to the bill.

The genuineness of all of these letters, except one, is admitted. The answer denies "that the said letters and communications were written by the said parties with intent to commit a fraud, or in furtherance of a conspiracy to fabricate a title, as charged in said bill, except so far as the said intention appears from said letters on the part of the said James Alexander Forbes." § 32.

Two of the defendants claim under James Alexander Forbes. As to him, the conspiracy to fabricate a title, "so far as appears from said letters," is admitted.

An examination of the letters will, however, convince us that whatever fraudulent designs were entertained by James Alexander Forbes, were equally entertained by the parties whose agent he was, and with whom he was in correspondence, and that the somewhat anomalous case is not presented of a conspiracy by one person.

The original act of possession, or registry of the mine, was obtained, as alleged by defendants, by Castillero for the benefit of himself and his *socios* or partners. On the 12th June, 1846, Jose Castro, in pursuance of powers given to him, as he recites, by his other partners, executed a power of attorney to one McNamara, authorizing him to enter into a contract for the three *pertenencias* of the mine with an English company, "with exclusion of any other nation." This power of attorney, if its date be genuine, must have been executed on the occasion of McNamara's visit to California in May, 1846, as mentioned in Alexander Forbes' letter of May 11, 1846. He seems not to have immediately acted on it, for a letter is produced from him dated at Honolulu on the 27th September of the same year.

As the alleged dispatch of Castillo Lanzas was written in Mexico on the 23d May, 1846, it is evident that at the time of executing this power of attorney the only evidence of title to the mine which Castro could have possessed, or the existence of which he could have known, was the act of the alcalde,

in which possession is given of three thousand varas in every direction from the mine. The power of attorney, however, exclusively refers to three *pertenencias* of the mine.

In pursuance of this power of attorney, McNamara, on the 28th day of November, 1846, at Tepic, entered into a contract with Alexander Forbes for the working of the mine. It is, we think, evident from the letter of Alexander Forbes, of January 7, 1840, that Castillero was present at this negotiation. In that letter Forbes says, "I had the pleasure to receive your very obliging letter of the 29th October last (1846), which chiefly relates to the mine of quicksilver about which I wrote you at so much length by Mr. McNamara. I had, previously to the receipt of your letter, been in treaty with D. Andres Castillero, and on the arrival of Mr. McNamara with powers from the other proprietors, the treaty was much facilitated; and I am now happy to inform you that I have contracted the *habilitacion* of the mine, and have purchased a portion of Mr. Castillero's *barras*, all of which will be made known to you by Mr. Walkinshaw, who goes to California as my agent and attorney for the examination and working of the mine."

If, then, as would seem to be the case, Castillero was present when the contract between Forbes and McNamara was entered into, it is strange that he did not himself become a party to it; and it is still more strange that the contract refers exclusively to the working of "the three *pertenencias* embraced in said quicksilver mine," and makes no allusion whatever to the two *sitios* tract which Castillero must at that time have obtained.

The instrument by which Castillero ratified this contract, and also that by which he sold a portion of his *barras*, are dated in Mexico on the 17th December, 1846. In the deed of ratification, for the first time allusion is made to the two square leagues conceded to Castillero, and a copy of the Lanzas dispatch is annexed to it. No reference is, however, made to the mining possession of three thousand varas in every direction, nor to any alleged confirmation of it, but the contract of McNamara for working the three *pertenencias* of the mine is alone referred to.

In the letter of James Alexander Forbes, in reply to that of Alexander Forbes, of January 7, 1847, and to another of

the 27th January, which is not produced, he says, "It is of the most vital importance to obtain from the government of Mexico a positive, formal and unconditional grant of the two *sitios* of land conceded to D. Andres Castillero, according to the decree appended to the contract, and also an unqualified ratification of the judicial possession which was given of the mine by the local authorities; including, if possible, the three thousand varas of land given in that possession as a gratification to the discoverer. These documents should be made out in the name of Don Andres Castillero." He then expresses the opinion that it will not be difficult to obtain these documents from the supreme government, and adds that they should be of the date of the decree of Senor Lanzas. This letter is relied on by the defendants, as showing that at that time the decree of Lanzas, as now produced, was in existence. It must be admitted that the reference to a dispatch of Lanzas, ordering a possession of two *sitios* to be given, is clear. Whether that dispatch is in all respects the same as that now exhibited does not so certainly appear. But it is equally clear that the recommendation to procure other documents, the dates of which were to be false, is unequivocally and explicitly made.

No letter is produced from Alexander Forbes which discloses the manner in which this proposition was received; but in October of the same year we find that the latter has come to California, and is actively engaged in exploring the mine. His proceedings while here will hereafter be referred to.

Mr. Alexander Forbes seems to have remained in California until the end of March, 1848. In April of the same year he appears to have sold his interest in the contract to various *habilitadores*, among whom Jecker, Torre & Co. and the house of Barron, Forbes & Co., of Tepic, were chiefly interested.

The first letter from these parties is dated on the 20th May, 1849, and is addressed to James Alexander Forbes. It commences as follows: "From certain circumstances you have communicated to us, it may be necessary to purchase some lands in the vicinity of the mine of New Almaden." It then empowers James Alexander Forbes to make such purchase at a sum not exceeding \$5,000. On the 27th May, 1849, a *memo-*

randum was left with Alexander Forbes, at Tepic, by James Alexander Forbes, "of the documents which Castellero will have to produce in Mexico." The documents required were as follows: 1. A full approbation and ratification of all the acts of the *alcalde*; 2. An absolute and unconditional title for two leagues of land to Andres Castellero, with boundaries which are mentioned; 3. The dates to be arranged by Don Andres, and to be certified by the American minister. We will hereafter see that this memorandum was alluded to, and its contents repeated, in subsequent letters between the parties.

On the 28th October, 1849, James Alexander Forbes, in a letter to William Forbes, again alludes to the insecurity of the title on which the mine was held. After stating his apprehensions of the destruction of some important papers of the original registry of the mine, or that a question might arise as to their legality, and after adverting to the fact "that no posterior grant of the government could authorize the occupation of the land of the Berreyesas, on which the mine is declared to be situated, in the original *expediente* of registry," he adds, "In view of these facts, it behoves you to obtain from the supreme government of Mexico the full and positive grant of the two *sitios* of land upon the land of New Almaden, under date of the order to Castillo Lanzas, bearing in mind that this document must express the entire approbation of the supreme government of all the concessions made by the local authorities or *alcalde* of the district of San Jose of the original grant or registration of the mine." He then proceeds to give the boundaries which should be mentioned in the concession. They are the same as those given in the *memorandum* above referred to.

In the succeeding letter which, perhaps erroneously, has the same date as the last, James Alexander Forbes again calls the attention of William Forbes to the importance of his suggestions relative to the "perfecting of the title to the mine," and adds, "Without now entering into particulars already explained to yourself and Mr. Alexander Forbes verbally, I desire only to impress upon your mind the vast importance of securing from the supreme government of Mexico the documents comprised in the memorandum left with Mr. Alexander Forbes when I was in Tepic, for Castellero."

On the 30th October, 1849, he again recurs to the subject. In his letter of that date he says, "You will now readily perceive the great importance of my advice to purchase a part both of the lands of Cook and of the Berreyesas. You were of opinion that this measure would not be necessary, in view of the *supposed facility of getting the title to the mine perfected in Mexico*. It is now more than five months since it was decided that Castillero should procure the necessary documents in that city, and that they should be sent as soon as possible. On the one hand, I depend on the *precarious* and illegal possession of the mine granted by the alcalde to Castillero, who was in reality the judge of the quantity of land given by the alcalde. On the other side, I am attacked by the purchasers of the same land declared by Castillero himself to comprise the mine."

He concludes as follows: "I do entreat you to use every effort to send me the document of the ratification of the mine, and the grant thereon, at the very earliest opportunity—*properly authenticated and certified, as explained by me when I was in Tepic.*"

On the 30th November, 1849, Barron, Forbes & Co. reply to the communications of Jas. Alex. Forbes.

As this is the first letter in which his suggestions are noticed by the parties with whom he was corresponding, it is important to see how they were received, and how far the allegation of the answer that the design of fabricating a title existed on the part of James Alex. Forbes alone is sustained.

After acknowledging the receipt of letters and communications from Jas. Alex. Forbes, by the steamers "California" and "Panama," Barron, Forbes & Co. say, "We are glad that you have not been obliged to purchase Berreyesa's land. This is certainly a most important point, and we trust that the document sent will be of great consequence in that respect. But you will of course take care that no risk is run, and you will do in this affair as your best judgment shall direct you, keeping in view that *at all hazards, and whatever cost, the property of the mine must be secured. Castillero, we expect will soon be here from Lower California, and if anything can be done in Mexico, he is the fittest person to procure what may be wanted.*"

On the 1st December, 1849, Alexander Forbes writes to James Alex. Forbes as follows: "The document sent up to you by the last steamer, for the grant of lands to D. Andres Castillero, was *by mistake, not the one meant to be sent. I find now that the proper one was registered by me in Monterey, and the original deposited there.* The one sent you was directed at foot to the governor of California, and the one deposited at Monterey was directed to *Don Andres Castillero. The difference is, that by one the delivery by the governor was perhaps necessary to make the grant valid, whereas the other, being addressed directly to Don Andres, did not require that formality, nor was any other proceeding necessary, thus making it a better document than the greater part of the other titles for lands in California.*" He then proceeds to advise James Alex. Forbes to apply for a copy of the Monterey document, and to withdraw the one sent, and substitute the other. After reminding him of "another difficulty," viz., that the instrument made in the city of Mexico contains an exact copy of the document sent to him, and addressed to the governor, he concludes by leaving the whole subject to the discretion of his correspondent.

It is apparent, from this letter, the genuineness of which is admitted, that two documents were then in existence, purporting to be concessions of land to Castillero. One addressed to the governor, which is that now produced, and one addressed to Castillero, which has disappeared. None such has been found at Monterey, where Alexander Forbes himself states he deposited it; nor do the defendants now claim that any such document was ever issued. If, as Forbes states, such a document was deposited in Monterey, it must have been fabricated. For the theory of this case on the part of the defendants is, that the dispatch to Lanzas, addressed to the governor, constitutes their only title for the two *sitios* grant.

On the 20th December, 1849, Jas. Alexander Forbes, in a letter to Barron, Forbes & Co., acknowledges the receipt of a certified copy of the grant of the two *sitios* to Castillero, and states at length his opinion that it is insufficient. He again urgently recommends that "Castillero, or some other fit person, should obtain from the supreme government of Mexico, a positive, explicit, and unconditional grant of the two *sitios* of

land. In this document particular reference must be made to the concession of the mine by the alcalde of San Jose, approving of said concession, and conceding to Castellero and his associates in place of the three thousand varas, the said two *sitios* of land, citing dates, and *making that of the said document to correspond with the imperfect and ambiguous document of which you have sent me the copy.*"

At the close of this letter he adds, "I pray you not to be deluded into the belief that there will be no necessity for *obtaining* the document herein described."

On the 29th January, 1850, James Alexander Forbes acknowledges to Alexander Forbes, the receipt of a copy of the contract of *habilitacion*, and adds, "As you request me to address myself to B., F. & Co. (Barron, Forbes & Co.) on the affair of the mine, I have now written upon this particular subject, to which I request their earnest attention, not as regards the habilitation, *but another document which you know of.*"

On the 3d February, 1850, Alexander Forbes writes to James Alexander Forbes as follows: "I have every reason to believe that the documents you mentioned will be found in the city of Mexico; and as Mr. Castellero will return there, they will no doubt be procured; but we are at some loss to know what *is exactly wanted*, and I beg you will by the next steamer give a sketch of the documents to which you allude, particularly a description of the limits of the grant. I think you must not have received the information sent you of the existence of the grant of the two *sitios* directly to Castellero and registered in Monterey; nor am I sure if that will mend the matter."

After alluding to a last resort which he mentions "with great repugnance," viz., "the promotion of the invalidation of the title of the Berreyesas to their rancho," and adding that "if no opposition or disclosures are made, they may be left in possession," he proceeds as follows:

"We think at present that it may be the best plan to get an authenticated copy of the approval of the Mexican government of the grant of 3,000 varas given by the alcalde. Castellero says such approval was given, and that on his arrival he will procure a judicial copy of it. This is the plan we shall adopt,

if we hear nothing from you to alter this resolution. Since writing the foregoing, I have looked over your private letter to William Forbes, dated October 18th, and find you state the limits or boundaries as follows." Mr. Forbes then states the boundaries, and adds, "Castillero is not certain of accomplishing this latter plan, and thinks the first, that is, the three thousand varas, the best."

And on the 6th February, 1850, Barron, Forbes & Co. write to Jas. Alex. Forbes, informing him that "they had hoped that the document lately sent for this grant to Castillero, would have been sufficient; but as you seem doubtful on this point, we have spoken to him, and his opinion is, that if this grant is not tenable, it will be better to go upon the three thousand varas of the alcalde, granted at the time of giving possession of the mine, and approved of by the Mexican government, which approval will be taken from the Mexican archives and sent on to you."

On the 26th February, 1850, Jas. Alex. Forbes again addresses Alexander Forbes on the subject of the title. He says, "I really did have more faith in the tact and ability of Castillero to perceive the important objects set forth in my memorandum of what was to be done nine months ago by that eccentric individual, and that with the powerful *influence he was to have exercised, and the efficient aid that was to be lent him, he would meet with no obstacle to the attainment* of the important documents explained in that memorandum. But Castillero has deceived himself; for he thought that boundaries were not necessary, as I shall presently show you. He succeeded in obtaining the grant of two *sitios* to himself in the mining possession of Santa Clara, while that very act of possession declares that the mine is situated on the land of Jose Berreyesa, five leagues distant from Santa Clara, etc. Without troubling you with what I have so many times written and explained to you verbally on the importance of the acquisition of the *document*, I will only say now what it *must* be; and it is this." The documents so often mentioned are again described with the impressive injunction that "both *must be of the proper date, and placed in the proper governmental custody in Mexico.*"

On the 2d March, 1850, Barron, Forbes & Co. inform James

Alex. Forbes that "Mr. Barron and Don Andres Castillero are about to proceed to Mexico, *and will attend to what you have recommended.*"

On the 16th March, 1850, Alexander Forbes writes to James Alex. Forbes, "Mr. Barron and Castillero have gone off to Mexico, and I wrote them to-day respecting the *document you know of, which, if possible, will be procured.*" This letter significantly concludes, "*Let us have quicksilver and all will be well.*"

On the 7th April, 1850, Alexander Forbes informs Jas. Alex. Forbes that "Mr. Barron and Castillero have arrived in Mexico, and have *every prospect of finding the documents you are aware of.*"

With this letter of the 16th March, 1850, all information as to the operations of Barron and Castillero in Mexico ceases. It is not disclosed what unexpected obstacle prevented their "*finding*" in Mexico the documents so much desired, or whether the doubts which Castillero entertained of "Leing able to accomplish *the latter plan*" (*i. e.*, the grant of two *sitios* by definite boundaries) were unhappily realized.

Comment on the evidence afforded by these letters of a conspiracy to fabricate titles on the part, not of James Alexander Forbes alone, as the answer admits, but of Alexander Forbes, and of Barron, Forbes & Co., is unnecessary. The full and specific instructions for the documents "*to be procured,*" and for the "*arrangement of their dates,*" originally given by Jas. Alex. Forbes, and so frequently referred to and repeated; the recital, in the letter of Alexander Forbes, of February 3, 1850, of the boundaries indicated in the memorandum left by Jas. Alex. Forbes at Tepic; the positive statement by the former that the documents mentioned would, no doubt, be *procured* by Castillero; the doubts as to the best "*plan*" to be pursued in their fabrication; the announcement by Barron, Forbes & Co. that Mr. Barron and Castillero "are about to proceed to Mexico, and would attend to what Jas. Alex. Forbes had recommended;" the significant instruction of Alexander Forbes to Jas. Alexander Forbes that "*the document you know of*" will, if possible, be procured; and, finally, the announcement that they had arrived in Mexico, and "had every prospect of finding the *documents you are*

aware of,"—seem to establish beyond doubt, the existence of the conspiracy to fabricate titles as alleged in the bill.

The nature of the suggestions of James Alexander Forbes is as clear as language can make it. No answers from Alexander Forbes or from Barron, Forbes & Co. are produced in which those suggestions are rejected with the natural indignation of honesty. On the contrary, they are received and acted upon.

It is urged, however, that these letters themselves disclose that the Castillo-Lanzas dispatch, now produced, was in existence at least as early as May 5, 1847; and that therefore it must be regarded as genuine, whatever designs may have been subsequently entertained to fabricate or to "*procure*" other documents.

We have seen that this document for the first time appears in the instrument of ratification by Castellero, dated at Mexico, December 17, 1846; that no mention is made of it in the contract of McNamara with Alexander Forbes, made at Tepic, and dated November 28th of the same year, although it would seem from Alexander Forbes' letter that Castellero was then present, and must have then been in possession of the Lanzas dispatch if it was issued at the time it is dated. Admitting, then, that the dispatch referred to by James Alexander Forbes in his letter of the 5th May, 1847, is the same as that now produced, a copy of which is appended to the contract of the 17th December, it merely proves that the dispatch was in existence at the latter date, which was after the entire subversion of the Mexican authority in California.

If, however, the letter of Alexander Forbes of March 28, 1848, be genuine, it is an express admission that all the documents produced by Castellero in Mexico as his title to the mine and lands were obtained long after the occupation of California by the Americans.

In that letter Mr. Forbes says, "But this interest renders it necessary for me to have the control of all the shares, in order that I may dispose of the whole whenever an opportunity may offer, and save myself from the heavy loss that would ensue should it unfortunately leak out that in fact all the documents procured by Castellero in Mexico as his title to the mine and lands *were all obtained long after* the occupa-

tion of California by the Americans." "This unfortunate irregularity can not easily be repaired, and serious objections might be made to our new act of possession."

The authenticity of this letter is denied by the defendants. The original is not produced. It is stated by James Alexander Forbes to have been stolen from him. The existence of the original and the accuracy of the copy are sworn to by two witnesses, James Alexander Forbes and Robert Birnie. The latter swears that he was employed by one of the defendants to obtain from James Alexander Forbes any document that would be prejudicial to the mine, and he was informed that any such document would be liberally paid for. He accordingly made a copy of the letter of Alexander Forbes of March 28, 1848, which he gave to Mr. Barron, by whom he was paid at the time \$200, and \$200 a few days afterward. That the copy now produced is the same as that left with Mr. Barron, and that the original was in the handwriting of Alexander Forbes, with which the witness is acquainted. James Alexander Forbes states that on the day on which he furnished a copy of this letter to be given to Mr. Barron, the letter was stolen from his carpet-bag.

The character of Mr. Birnie is unimpeached. No affidavits contradicting any of the statements made by him have been submitted.

We are therefore not warranted in treating the allegation of the answer that this letter is forged, as sufficient to establish the fact.

We have seen from the letter of Alexander Forbes of the 1st December, 1849, and from his letter of 3d February, 1850, that at the date of the former there were at least two documents for the grant of lands to D. Andres Castillero: one, a notarial copy of which had been sent to James Alexander Forbes, which was directed at foot to the governor; the other, the original of which was deposited at Monterey, and which was "directly addressed to Don Andres," and therefore did not, in the opinion of Alexander Forbes, require a delivery by the governor to make it valid.

This latter, as has been stated, has not been produced, nor is it pretended by the defendants that it ever existed. The fact that Mr. Forbes deposited at Monterey the original of a doc-

ument which would thus seem to have been fabricated, may well suggest suspicions as to the genuineness of the other which is now produced.

In the exhibit attached to the deposition of Jose M. Lafragna, a copy of the Castillo-Lanzas dispatch is found, together with a certificate of Jesus Vejar, a notary public, signed as it recites, on the 1st March, 1850, "at the instance of Messrs. Barron, Forbes & Co." In this certificate the notary attests that the dispatch signed by Lanzas has "been respected under that signature, and obeyed by the Mexican authorities that governed in Upper California in the year 1846—according to insertions which said authorities made of said instrument in acts which they passed upon the subject of which they treat, and which I certify to have seen."

Almost every statement contained in this certificate is admitted to be false. It is not pretended by the defendants that the dispatch of Lanzas was ever delivered to the governor, nor that it was even presented to, much less "respected and obeyed by the Mexican authorities of Upper California, in the year 1846." The "insertions of said instrument, made by those authorities, in acts which they passed upon the subject," and which the notary certifies to have seen, are purely imaginary. When a certificate of this character is procured from a Mexican notary, by some of the defendants in this case, and by them filed as an exhibit, the court is surely justified in regarding with suspicion, not only all documents which are authenticated in a similar manner, but also those the genuineness of which is assailed by other proofs.

We have thus far considered the case as it is presented by defendants, and as it appears from the letters admitted by themselves to be genuine, with the exception of one letter, the genuineness of which they deny. We have not thought it necessary to enter upon a minute examination of the mass of evidence which has been offered on either side. That duty properly belongs to the district court.

Whether or not the letters are susceptible of an explanation consistent with the *bona fides* of the parties by whom they are written, whether or not the testimony of Lafragna, and other witnesses, the mention of this grant in his report, and the production of the document from the archives, and other evi-

dence which may be offered hereafter, will be sufficient to satisfy that court of the genuineness of the titles produced by the defendants, we can not now anticipate.

We have only entered upon the inquiry so far as was necessary to show that the allegations of fraud in the bill are sustained by testimony sufficient to suggest grave suspicions as to the genuineness of the titles on which the defendants rely, and to justify the court in interposing, by injunction, in behalf of the legal title, to stay the destruction of the estate in controversy, pending the proceeding by which the validity of the title will finally be determined.

Allusion has been made to the visit of Alexander Forbes to California in October, 1847. His proceedings on his arrival will now be adverted to, with a view of showing how the possession of the lands and mine now held by the defendants was acquired.

In the letter of James Alexander Forbes to Eustace Barron, dated January 30, 1846, information is given that "Castillero, a sort of commissioner from the Mexican government, is working a quicksilver mine near the mission of Santa Clara." How long he continued in California does not appear except from the affidavit of Forbes, in which it is stated that soon after entering into partnership with his associates, he went to Mexico and never returned. It also appears from the same affidavit that Padre Real, one of the partners, was left in possession. On the 22d September, 1846, James Alexander Forbes writes to Alexander Forbes, "I am now in charge of the quicksilver mine, and am going to work it until I hear from Castillero, and am upon the point of striking a bargain for four shares." The motive for thus transferring the possession to James Alexander Forbes is stated by Mr. Forbes in his affidavit, and is in itself probable. It was to place the mine under cover of English protection, as the American forces were in possession of California, and Mr. Forbes was British vice-consul. The possession so delivered to Mr. Forbes comprised the mine itself, a log cabin and shed, together with some old tools and utensils. The cabin was not occupied, but an Indian sometimes slept in the mine. Up to this time, 2,000 lbs. of quicksilver had been extracted. It is further stated by Forbes that this possession was kept up by Indians whom he

sent to work there, although during the winter of 1846 it was for a time entirely abandoned.

Such seems to have been the situation of the property up to the time when Alexander Forbes acquired his interest in it by his contract with McNamara, and dispatched Walkinshaw to California as his agent. To him, Mr. James Alexander Forbes transferred the possession, and assays and observations were commenced. The scarcity of operatives and the indolence of the Indians appear, however, to have prevented any considerable operations. In the month of October, 1847, Mr. Alexander Forbes arrived in California, with tools and laborers.

On his arrival, explorations were immediately commenced, and on the 24th November, 1847, he announces the discovery of the "*cinta*," or vein of ores, the direction of which had been before entirely mistaken. On the 19th January, 1848, he writes to James Alexander Forbes, as follows: "I am very much obliged to you for your very prompt attention to the business in hand, and return the *expediente* immediately. I am much surprised at the result of your assay, and shall try what I have. It will, of course, be better to *say nothing about it, particularly as I have already written to Monterey that there is no mine*; nor does there appear to be any quantity of this kind of stuff. I hope *soon to see the alcalde*."

It is admitted in the answer that in January, 1848, the alcalde, James W. Weekes, made on the petition of Alexander Forbes, "a concession to him of the said mine, to correct and reform what had previously been given." The extent of the possession so given is stated by James Alexander Forbes to have been four *pertenencias*, or two hundred by eight hundred varas. It is to this "new act of possession" that Alexander Forbes probably alludes in his letter of 25th March, 1848, when he says "that serious objections may be made to its legality." Shortly after this possession was obtained, Mr. Forbes caused two square leagues to be surveyed around the mine, which in 1852 were put under fence, and have ever since been inclosed, and are now in possession of defendants.

It is obvious that neither the act of Weekes, by which possession was given of a tract of eight hundred by two hundred varas, nor the act of Forbes himself, by which possession was

taken of two square leagues, can have any validity against the United States, who had already acquired the legal title to and constructive possession of the land.

It is not claimed that at the time of the first possession any measurement was made or boundaries fixed of the three thousand varas of which possession was alleged to have been given. No evidence has been offered to show that the possession up to the time of Weekes' measurement was other than that described in the affidavit of Mr. Forbes.

It has already been stated that the mining title relied on by the defendants is claimed to be founded on a registry and act of possession by Pico, the alcalde of San José.

At the time when Weekes, the American alcalde, gave the possession of the mine and four *pertenencias* above referred to, Alexander Forbes also procured from him a certified copy of the *expediente* of the mine. This copy was prepared by James Alexander Forbes from an original furnished to him by Alexander Forbes; and to this copy the certificate of Weekes is annexed, certifying it to be "a faithful copy made, to the letter, from its original, the *expediente* of the mine of Santa Clara, or New Almaden, which exists in the archives under my charge." This certificate is admitted to be untrue, or at least inaccurate. The original from the archives of the alcalde has since been produced, and it shows that the copy certified by Weekes is neither "faithful" nor "to the letter." It is evident that the copy certified to by Weekes could neither have been prepared from nor compared with "any original existing in the archives under his charge."

The original *expediente* now produced, is stated by Capt. Halleck, the superintendent of the mine, to have been found by himself in the office of Mr. Belden, Mayor of San José, in the winter of 1851. If this document be indeed the original denouncement and registry of the mine, and if from the time of the denouncement it had remained on file as an original record in the alcalde's office, it is strange that the superintendent and counsel of the mine should so long have been ignorant of its existence.

In the suit brought in 1850 for the possession of the mine, by Berreyesa against James Alexander Forbes and Walkinshaw in the District Court for Santa Clara county, a motion

was made to require the defendants to produce "all papers of a pretended grant for two *sitios*, together with all other paper or papers connected with the title to said Almaden mine or the land upon which the same is situated, upon which defendants intend to found their claim to said land or said mines, etc." This motion was granted by the court, and said papers "*or copies thereof*" were ordered to be produced according to said motion.

To this order the defendants answered by affidavit.

In this affidavit they allege "that they have exercised all diligence to procure the said documents; but have been unable to do so, but expect soon to receive them from the parties in Mexico who hold them."

They further aver "that the said documents and others which they have sent for in Mexico, are necessary to enable them to proceed to the trial of the cause; and they specify the following documents as absolutely necessary to them before they can proceed to trial."

1st. "The original denouncement of the mine of New Almaden, and the judicial possession given of the same in the year 1845."

2d. "The confirmation of said denouncement and possession by the supreme government in 1846, and prior to the late declaration of war by the United States against Mexico."

3d. "The original grant of land, including said mining possession, made by the supreme government of Mexico prior to the declaration of war as aforesaid to the owners of said mine."

This affidavit is sworn to by Mr. Halleck, one of the attorneys for defendants. It is evident that at this time, viz., December, 1850, Mr. Halleck could not have been aware that the original denouncement of the mine and judicial possession of the same given in the year 1845, was not in Mexico, but on file among the archives of the alcalde's office to which it belonged. Nor could he have been aware that the concession of two leagues and the ratification of the mining possession were not, as implied in his affidavit, contained in two documents, but in one, viz., the dispatch of Castillo Lanzas, and that that dispatch was not dated "prior to the declaration of war by the United States," but ten days subsequently.

But at this very time Mr. James Alex. Forbes, one of the defendants in that suit, had already received a notarial copy of the Lanzas dispatch, addressed to the governor of California; and the original of another, addressed to Andres Castillero himself, he had been informed by Alexander Forbes had been deposited and registered in Monterey.

Up to the time of filing the petition of Castillero to the board of land commissioners, the original *expediente* on file in the recorder's office seems to have escaped observation; for the exhibit filed with that petition is a copy of the document certified to by Weekes, and not a copy of that since produced from the recorder's office. We are aware that all these circumstances may be explained, and that the genuineness of this document is testified to by a number of witnesses. We have referred to the manner and time of its production, to show that it has not that proof of genuineness which would be afforded by its admitted production from the archives of a Mexican office, transferred to us on the acquisition of the country.

The defendants have also produced in support of their title a large number of documents, purporting to be copies of originals on file in Mexico. They consist of official communications from various officers in Mexico, and purport to be the proceedings of those authorities, on the application of Castillero to the Junta for the Encouragement of Mining, and which resulted, it is claimed, in the concession of the two *sitios*, as shown in the dispatch of Lanzas.

None of these documents are authenticated under the great seal of Mexico. They are certified by the secretary or chief clerk of the departments in which the proceedings purport to have taken place. They have been recently procured in Mexico by an agent of the defendants.

Whether documents alleged to exist in the archives of Mexico, can be regarded by the court if unauthenticated by the political power of that country under its great seal, it is not necessary now to decide. But as they have been obtained since the visit of Mr. Barron and Castillero to Mexico, and as the last injunction of James Alexander Forbes to Alexander Forbes was to have the documents referred to by him "of the proper date, and placed in the proper governmental custody

in Mexico," we are at least justified in regarding such documents with suspicion unless authenticated in the most satisfactory manner. But especially should we call for such proof, when we remember that the documents purport to be a grant of land in California, dated May 23, 1846, and that the Mexican government, in the original treaty of peace with the United States, declared in the 10th article, "that no grants whatever of lands in any of the territories ceded to the United States had been made since the 13th day of May 1846."

We have thus examined at greater length than was intended the evidence on which the United States rely, to sustain the allegations of fraud which are made in the bill. The evidence considered has been chiefly that afforded by a correspondence admitted, with the exception of one letter, to be genuine; and that relating to the production of the *expediente* of the mine, in great part presented by the defendants themselves. The examination has been prosecuted not with a view of reaching any conclusion upon the question involved, but merely to ascertain whether the allegations of fraud in the bill which are not positively denied by the answer, have such a probable foundation as to justify the court in interfering by injunction, to preserve the property during the investigation in which the validity of the title will finally be determined.

The results of the examination may briefly be recapitulated as follows:

It appears from the letters of the defendants, or those under whom they claim, that in the years 1847, 1848, 1849 and 1850, plans were discussed, and the design was entertained to procure documents from Mexico, the dates of which were to be "arranged" by Castillero, and which were to be "*placed in proper governmental custody in Mexico*," and certified copies of which were to be sent on. That in May, 1850, Mr. Barron and Castillero proceeded to Mexico, "to attend to what had been recommended" by James Alexander Forbes.

That documents have since been produced "from the proper governmental custody in Mexico," which are claimed to be a grant of two leagues of land and ratification of the mining possession. That these documents are not attested by the great seal of Mexico, or officially authenticated and

recognized as genuine by the political power of that country. That they are dated subsequently to the 13th of May, 1846, and that the Mexican commissioners solemnly and repeatedly declared to the government of the United States that no grants whatever of lands had been made in the territory of California since that date. That in December, 1849, two documents, of nearly similar import, appear to have been in existence, both of which could not have been genuine. That the original of one of these, which was deposited in Monterey, has disappeared; while the other is authenticated by the certificate of a notary, obtained, as it recites, at the instance of some of the defendants, nearly every statement of which is untrue. That the *expediente* of the mine originally produced, and which was by Alexander Forbes procured, to be certified by Weekes to be a "faithful copy to the letter" of the *expediente* on file in his office, is not a copy of the document since produced from that office.

That this last document was not discovered until 1851, and up to that time its existence seems to have been unknown to those of the defendants who were most likely to have known of it, and to their agent and attorneys.

That no measurement of the land alleged to have been granted by the alcalde, or demarkation of its boundaries, was effected during the continuance of the Mexican authority in this country; but the possession of the mine itself, which had been kept up with occasional interruptions by Indian workmen, was transferred after the occupation of the country to the British vice-consul, in order to place it under cover of the protection of the English government. That the first formal possession, by metes and bounds, of the tract now held by defendants, was taken long after the occupation of California by the American forces, and after the title of the United States had accrued. That at the time this possession was taken, the existence of valuable ores on the land was studiously concealed; and that two leagues of land were subsequently taken possession of and inclosed by the defendants without any authority whatever.

It further appears that the United States are now seized of the legal title of the land, and that the title of the defendants, assuming it to be a genuine but an imperfect or equitable title,

is one the validity of which, under the Mexican mining and colonization laws, is open to grave doubts. All these circumstances are, in our opinion, abundantly sufficient to show, not only that there is a substantial ground of controversy between the parties, but that the allegations of fraud in the bill, which are met with no positive denial in the answers, are sustained by proofs of the fraudulent designs of the parties, and of the manner in which the documents are produced, which leave the question of their genuineness open to grave doubts.

In such a case, where the substance of the estate and that which constitutes its chief value, is being wasted and carried off in enormous quantities, and where the threatened injury is to an extent far greater than can be compensated by damages, it seems to us clearly the duty of the court to preserve the property pending the litigation by which the right to it will be determined.

BURNETT V. WHITESIDES ET AL.

(13 California, 156. Supreme Court, 1859.)

¹General allegations insufficient if equities denied. A party who claims the right to the waters of a ditch and avers that defendants are diverting the same, and thereby causing irreparable damage, is not entitled to an injunction, if the answer denies the equity of the bill, unless some equitable circumstances beyond the general allegation of irreparable injury be shown, such as a threatened destruction of the property, or the like.

Appeal from the Tenth District.

MESICK & SWEZY, for appellant.

REARDAN, MITCHELL & SMITH, for respondents.

BALDWIN, J., delivered the opinion of the court, TERRY, C. J., concurring.

This appeal is from an order dissolving an injunction. The injunction was granted to restrain the defendants from divert-

¹ *U. S. v. Parrott*, 7 M. R. 336; *Moore v. Ferrell*, 7 M. R. 281.

ing the water of a certain stream from the plaintiff's ditch, the plaintiff claiming a prior appropriation and averring irreparable injury. The answer denies the equity of the bill, averring that the ditch of defendants only diverted the water not appropriated by the plaintiff. The fact further appears that the ditch of defendants has been constructed for several years within the knowledge of the plaintiff. The motion was heard on complaint and answer. There is no allegation of the insolvency of defendants, nor that they will not be able to answer all damages recoverable at law, nor any peculiar grounds shown why a recovery could not be had at law for these damages.

It presents the naked case of a claim of property and for damages made, and this claim denied, and no proof of the claim; and no showing of irreparable damage nor equitable circumstances calling for the interposition of the restraining power of the court. *Prima facie*, the party in possession of this water is at least as much entitled to the property as a claimant out of possession; and the answer of the defendants as much proof of the defendants' right as the complaint of the plaintiff is evidence of his right. The granting and dissolving of injunctions is very much a matter of discretion, but this discretion must be regulated by sound and just rules. For a court of chancery to interpose in such a case as this, might lead to the very hardships and irreparable injury which is the ground of the claim of plaintiff to its interference. It ought not to interpose, unless under very peculiar circumstances, when long delays have intervened since the alleged injury or cause of it existed; nor ought it to interpose unless some equitable circumstances beyond the general allegation of irreparable injury be shown—such as insolvency, or impediments to a judgment at law, or to adequate legal relief, or a threatened destruction of the property, or the like. But it is enough for this case to hold that as the entire equity of the bill is denied in the answer, and there is no support of the bill, the injunction should be dissolved: *Gardner v. Perkins*, 9 Cal. 553.

We understand that to be this case.

Judgment affirmed.

EMMONS V. MCKESSON.

(5 Jones' Eq. 92. Supreme Court of North Carolina, 1859.)

Surety can not rescind, discarding principal. Where A, as principal, and B, as surety, gave a note on an executory contract for the purchase of a copper mine in which contract a fraud was practiced on A, it was *held*, that a bill filed by B alone, praying for an injunction to stay execution on a judgment at law, obtained on the note, the bill setting up no other equity, and failing to pray for any disposition of the original transaction, was defective in substance.

Copies required on appeal. Sending up the original papers on appeal is not to be suffered, even where there is consent.

Appeal from an interlocutory order of the Court of Equity of Wake County, CALDWELL, J., presiding.

The plaintiff, the surety and his son, Eb. Emmons, Jun., joined in a note to the defendant, for the sum of \$500, as the price of one fourth of the defendant's mining interest in a certain copper mine in the county of Ashe, in this State, called the Maxwell mine, and at the time said note was given, the defendant, McKesson, entered into a bond to convey to the said Ebenezer Emmons, Jr., one undivided fourth part of said interest. When the note became due, the plaintiff and his son were absent from the State, and the defendant took out an attachment against them on account of said debt, and had one Samuel McD. Tate summoned as garnishee, and on his answer, the plaintiff not appearing to the suit, a judgment was rendered against them in the County Court of Burke, for the debt (\$599.11), and execution issued thereon to the sheriff of Wake county.

The plaintiff in his bill alleges that McKesson represented himself as the entire owner of the mine; that this was not the truth, for that one Willis was the owner of one half of it, and had so been declared by a decree of the Court of Equity of Burke county.

He also alleges that he was a citizen of Wake county at the

time the attachment was taken out against him, and that he, the plaintiff, had no right to take out that process against him; also that there was nothing levied on to sustain the attachment; for that Tate, the garnishee, did not admit that he owed plaintiff anything, and that for these reasons the judgment was irregular and void.

The prayer of the bill is for an injunction, "commanding the sheriff of Wake to proceed no further under the said *fi. fa.*," and for general relief.

The injunction issued in vacation as prayed, and on the return of the same, the defendant filed an answer, denying all the allegations of fact stated in the bill, upon which relief was asked.

On the coming in of the answer, the defendant's counsel moved for the dissolution of the injunction, which the court refused, and ordered it to be continued to the hearing of the cause.

From this order the defendant appealed.

CANTWELL and FOWLE, for the plaintiff.

E. G. HAYWOOD and MILLER, for the defendant.

PEARSON, C. J.

There is error in the decretal order. The motion to dissolve the injunction ought to have been allowed.

1. The bill is fatally defective in substance, and the injunction was improvidently granted. The only object of the plaintiff seems to be to have the defendant perpetually enjoined from issuing or enforcing execution on the judgment. What is to be done with the contract, in consideration of which the note was executed? Will a specific performance be hereafter asked for by the son of the plaintiff?

Or will he seek to have the contract rescinded on the ground that it was obtained by false representations?

These are matters about which the plaintiff supposes he has no concern, and yet it is entirely clear that his equity, if he has any, is a mere incident to the equity of his son, if *he* has any, and must be set up through or under him. Conse-

quently, the son ought to have been made a party, with proper allegations to set up his as the primary equity, which would lay a foundation for an injunction as ancillary and in furtherance thereof. No precedent can be found for a bill like the present, where an injunction against an execution on a judgment at law is the only relief asked for, and the original transaction is left open as a subject for future litigation.

In cases of injunctions to *prevent torts*, the plaintiff alleges a legal title and asks the interference of this court on the ground of *irreparable injury*. So, of course, a perpetual injunction is the only relief asked for. But in all other cases of injunction the plaintiff alleges some primary equity, as an equitable estate, which entitles him to call for a legal title, or an equitable right which he is seeking to enforce and the injunction is prayed for in aid of the primary equity, so as to prevent loss or damage or inconvenience until he has an opportunity to establish it. This subject is explained in *Patterson v. Miller*, 4 Jones' Eq. 451.

2. If it is admitted that the judgment is irregular or void, that constitutes no equity. The plaintiff has a plain remedy at law to have the judgment set aside or vacated, and the execution called in on motion, in the court where it was rendered; *Zachary v. Curtis*, 6 Ired. Eq. 199, cited for the plaintiff, has no bearing on the question.

3. The answer is a fair, full and direct response to every allegation of the bill on which the supposed equity of the plaintiff is put, and must, at this stage of the proceedings, be taken to be true. No equity is confessed, and no ground of exception can be taken to the answer.

4. We can see no reason why judgment should not be given on the injunction bond. It is true the only surety to it is the son of the plaintiff, who ought to have been a party to the bill, but the plaintiff can not be heard to object to the bond on that account. Nor is the position tenable that judgment can not be rendered on the bond because the injunction was improvidently granted, and the judgment at law which is complained of is void, for the statute is express, and applies to all injunctions commanding the stay of an execution. Ch. 32, Secs. 14 and 17, Rev. Code, provides: "Where an injunc-

tion shall be dissolved, judgment shall be rendered on the bond given on obtaining the same, in the same manner as on appeal bonds." This point is noticed because it was discussed in the argument.

5. The original papers are sent to this court instead of copies, and we find from the transcript that it was done by *consent, with leave to the Master to tax full costs*. The practice can not be allowed. The parties had no right to consent that the original papers should be taken out of the court below and sent up to this court, for the papers were in the custody of the court, and the parties had no control over them. Nor had the court below power, even with the consent of parties, to send up the original papers on an appeal from an interlocutory order, and thereby deprive itself of papers necessary to the original cause, which was still pending before it, and depend on this court to send the papers back, whereby it would be left without any record or evidence to show how the proceeding was constituted before it. So that one court or the other must be without a case. The papers can not be withdrawn from the office of this court unless the master of the court below files proper copies, *nunc pro tunc*.

We feel called on to add, if by the entry "with leave to the master to tax full costs" it be intended that he should tax costs as if copies had been made out and sent to this court, such a proceeding can not be sanctioned.

This opinion will be certified to the court below, with instructions to proceed accordingly.

Decretal order reversed.

PER CURIAM.

BILL V. THE SIERRA NEVADA LAKE WATER AND
MINING Co.

(1 DeGex, Fisher & Jones, 177. High Court of Chancery, 1859.)

¹ Attempt to restrain increase of shares through foreign legislature.

A company incorporated in California was doing business there, but most of its shareholders were resident in England. At a meeting of the English shareholders a resolution passed authorizing the trustees to take steps for increasing the preference shares to an extent not allowed by the existing charter. It appeared there was no intention to create preference shares except upon action of the California legislature: *Held*, that an injunction ought not to be granted to restrain the company from acting on the resolution, for that the court will not in general restrain parties from applying to the legislature, whether of this or of a foreign country.

This was a motion by the defendants to discharge an order of Vice Chancellor STUART, granting an injunction to restrain the defendants, the company and their officers, from increasing or attempting to increase the number of Class A shares in the company beyond 5,000, and from paying or authorizing or sanctioning the payment of any preferential dividend on any but the 5,000 shares, and from in any manner acting upon or carrying into effect a resolution of the 28th of October, 1859.

The company was incorporated in 1854, by an act of the Californian legislature, its principal object being the conveyance of water by an aqueduct from Truckee Lake to Forest City, and other places in California. By the act of incorporation it was provided that the company might, whenever it was desired to increase or diminish the capital, call a meeting of the shareholders by a notice, signed by at least a majority of the trustees, and published for at least four weeks in some newspaper of the county where the principal place of business was situate, which notice was to specify the object of the meeting, the time and place at which it was to be held, and the amount to which it was proposed to increase or diminish the capital, and a vote of two thirds of the shareholders in

¹ See *Heathcote v. North Co.*, 2 Mac. & G. 100; *Greenville v. Seymour*, 22 N. J. Eq. 458.

amount was to be necessary to authorize such increase. The certificate of incorporation, dated the 24th of August, 1854, stated the objects of the company, and provided that its capital should be 2,000,000 dollars, divided into 20,000 shares; that the company should continue for fifty years, unless sooner dissolved under the provisions of the law; that the number of trustees should be in the first instance three, and that the principal place of business should be at Downieville, in Sierra county, California.

The shares were chiefly taken by English capitalists, and the company took an office in Tokemhouse Yard, London, where its affairs were in reality principally carried on. The capital was, some time after the foundation of the company, legally diminished to 1,000,000 dollars in 10,000 shares.

By an agreement dated the 17th of April, 1856, made between all the then shareholders in the company, it was agreed that the 10,000 shares should be divided into two classes, class A and class C, each consisting of 5,000 shares, and that the owners of class A shares should be entitled to a preferential dividend of £20 per cent., and that when the profits were sufficient to pay the same dividend to the C shareholders the surplus should be divided equally.

This agreement was acted upon shortly afterward; by-laws were made providing, among other things, for the election by the shareholders of a committee to manage the business in London.

In June, 1857, the plaintiff became a shareholder in the company by purchasing thirty-five of the class C shares.

On the 1st of June, 1859, at a meeting of the company, a resolution was passed for converting 800 C shares into A shares. The plaintiff filed a bill for an injunction to prevent the company from carrying this resolution into effect. The injunction was granted in the same month, and nothing further was done upon that resolution.

At the half-yearly meeting of shareholders held in London on the 28th of October, 1859, the following resolution was passed:

"It appearing that the balance of outlay to Forest City, including the Rudyard reservoir, has exceeded the original estimate of Mr. Romaine by £7,000, to which the five extra miles

of canal and branches have to be added, besides the costs of the Camptonville extension, amounting to £12,000, and that the conversion of the company's C shares has been a failure, and that no addition has been made to the capital to cover the deficiency, it was then resolved that the directors be authorized to take the necessary steps abroad for increasing the A capital by a sum not exceeding £30,000, so as to perfect the works, satisfy the shareholders who are wanting shares for their advances, and discharge the remaining obligations of the company."

The bill was filed by the plaintiff on behalf of himself and all the other shareholders in class C, except such of them as were defendants; and it alleged that the directors intended to act on the resolution and issue new preference shares.

The plaintiff moved for an injunction. From the affidavits in opposition it appeared that the defendants had no intention of attempting to issue new preference shares merely by force of the resolution, but that in pursuance of it instructions had been sent out to take steps to procure an act of the Californian legislature sanctioning an increase of the number of A shares.

The vice chancellor granted the injunction as prayed, and the defendants appealed.

Mr. BACON and Mr. RODWELL, for the appellants.—We submit that the court has no jurisdiction to make such an order as has been made by the vice chancellor, the company being a foreign company dealing only with immovable property situate abroad, and the appearance of the company, though it would waive a mere irregularity, does not create jurisdiction.

[The Lord Justice TURNER.—Suppose all the capital to have been subscribed here, do you say that the court would not have jurisdiction to prevent the application of it to purposes not authorized by the constitution of the company?]

We do not dispute that the court might do that, but we say that this is a company constituted according to foreign law, having its principal place of business abroad, and formed for carrying out an undertaking in the same country, and that the court has no jurisdiction to restrain such a company from applying to the legislature of the country in which it is dom-

iciled for a variation in the terms of its constitution. This is like a bill to restrain an application to Parliament—a relief which this court is not in the habit of granting—and there is no difference in principle between the ordinary case of an application to our Parliament and the case of an application to the Californian legislature on behalf of a company circumstanced as this is. The case is very like *Stevens v. South Devon Railway Company*, 13 Beav. 48.

Mr. SURRAGE (Mr. MALINS with him) for the plaintiff.—The question of jurisdiction is settled by the acquiescence of the company in the former injunction. The company is, for all practical purposes, an English company. The governing body is here, almost all the shareholders are here, and almost all the important business of the company is transacted here. To increase the preferential capital is a step not authorized by the by-laws or by the act of incorporation.

[The Lord Justice TURNER.—Could not the Californian legislature authorize it?]

If it does so we must submit; we shall be content with an injunction restraining the company from increasing the A capital without legislative sanction. The resolution proceeds on the footing that the company can do the act without any other authority.

Mr. BACON, in reply.—The evidence plainly shows that there is not, and was not when the bill was filed, any intention to increase the A capital without first obtaining legal powers of doing so. An injunction might be granted against applying the common funds for that purpose if the company were about to do so, and the bill were properly framed; but the bill makes no case of that nature, nor would the facts support such a case, for there are no such funds, and the expenses can only be met by a subscription. The relief sought is simply to restrain an application to the legislature, and this the court will not do: *Ware v. Grand Junction Waterworks Company*, 2 R. & Myl. 470.

The Lord Justice Knight BRUCE.—The domicile, purpose and objects of the Sierra Nevada Company are such that in my judgment the court ought not to act against the defendants for the purpose of injunction in such a case as the pres-

ent, at least on an interlocutory application. I think that the injunction and order should be discharged, and the costs before the vice chancellor, and here, be made costs in the cause.

The Lord Justice TURNER.

On the opening of this case I thought it might involve questions of considerable importance, but after having heard the argument I do not think that it does. I do not consider it necessary to enter into the question of jurisdiction or into the question as to the power of the shareholders in this country to direct the trustees to do an act not authorized by the powers vested in the trustees. All that the shareholders here professed to authorize to be done is that the directors shall take the necessary steps for increasing the A capital to an extent not exceeding £30,000. Now the necessary steps to be taken must be steps to be taken through the medium of the legislature of California, or through the medium of the trustees in California. It is not suggested that any proceeding by the trustees in California could enable the act to be done, which is sought to be prohibited; indeed the plaintiff's argument is that, though the act of the Californian legislature gives power to increase the capital, it does not give power to increase it for the benefit of one class of shareholders at the expense of another. His case is, that they can not do the act, and the evidence shows that they do not intend to do it otherwise than by means of an application to the Californian legislature. The case, therefore, which we have to consider is, whether there is any equity upon this bill to restrain the trustees from applying to the Californian legislature to enable them to carry out what has been resolved upon, and I can not see any.

It is not the habit of this court to restrain persons from applying to the legislature of this country, and that being so, I do not see any principle which can justify the court in interfering to restrain them from applying to the legislature of a foreign country. It is said that they ought not to be allowed to do so at the expense of the company. I agree there may be an equity to restrain them from applying the funds of the company in defraying the expenses of the intended ap-

plication; but there is no such case before us. If the plaintiff means to raise this question, he should have amended his bill when he found that the intention was to apply to the Californian legislature, and sought for an injunction to restrain the trustees from such an application of the funds. I am of opinion that the injunction should be dissolved, and the costs in both courts be made costs in the cause.

ELDRIDGE ET AL. V. WRIGHT ET AL.

(15 California, 89. Supreme Court, 1860.)

¹ **Application to Supreme Court to enjoin pending the appeal.** Plaintiffs being about to appeal from an order dissolving a preliminary injunction, the judge below made an order that upon the perfecting of the appeal the order granting the injunction should revive and continue in force. Plaintiffs perfected the appeal and applied to the Supreme Court for an injunction pending the appeal on the ground that defendants were disregarding the reviving order: *Held*, that the application be denied because the order reviving the injunction was ample to protect the plaintiffs until the appeal could be heard, or the injunction be dissolved by some competent authority.

Appeal from the Third District.

The suit is to obtain a perpetual injunction restraining defendants from obstructing a certain road leading to the quick-silver mines of plaintiffs. The complaint avers plaintiffs to be owners of a mine situated on a portion of a rancho, the title to which is derived from the Mexican government; that by conveyances from the grantee, plaintiffs have the right of way over all portions of said rancho; that defendants are working another mine on the same rancho; that the only practicable road leading from plaintiffs' mine to the main highway goes by the mine defendants are working, and that defendants, to injure plaintiffs, wantonly obstruct said road, by putting gates across it and preventing all ingress and egress. The complaint avers the great value of the mine, large number of laborers employed, and that said obstructions are ruinous, etc.

¹ *Swift v. Sheppard*, 1 West Coast R. 133; *Merced Co. v. Fremont*, 7 M. R. 309.

Plaintiffs obtained a preliminary injunction restraining the obstruction of the road which, upon answer being filed, was dissolved. Plaintiffs being about to appeal from the order dissolving the injunction, the judge below made an order that, upon such appeal being perfected by filing a bond, etc., as required by him, the order granting the injunction should be revived and continue in force. Plaintiffs perfected the appeal and applied to the Supreme Court for an injunction pending the appeal, on the ground that defendants were disregarding said reviving order, and obstructing, to the ruin of plaintiffs. The application was made on affidavit of the facts, the transcript on appeal being filed.

WM. T. WALLACE, for the application.

BALDWIN, J., delivered the opinion of the court, FIELD, C. J., and COPE, J., concurring.

Application for injunction. We deny the application. We see no necessity for this application, if we had the power to grant it, for the remedy of the plaintiff under the order reviving the injunction pending the appeal is ample to protect the plaintiff until the appeal can be heard, or the injunction be dissolved by some competent authority.

SLADE V. SULLIVAN ET AL.

(17 California, 102. Supreme Court, 1860.)

¹ A prayer for injunction is addressed to the discretion of the court, and upon the facts of the case the discretion of the court below having refused to grant the writ, the damage threatened not great and the insolvency of the defendants denied, the action of the court below was approved

Appeal from the Eleventh District.

The record consists, substantially, of the complaint, answer and findings of the court—there being no evidence in it.

¹ *Hiller v. Collins*, 63 Cal. 235; *Hicks v. Compton*, 18 Cal. 206; *Real del Monte Co. v. Pond*, 7 M. R. 452.

The complaint avers that in 1854, one Stephens was the owner and in possession of a tract of land near Auburn, Placer county, containing about four hundred and twenty acres, known as a milk ranch, and erected thereon a wood house and about one hundred and fifty feet easterly from it, barns and sheds, at an expense of \$3,000; that about two hundred feet in front of the house and barns is a wagon road, between which and the house and barns, and one hundred and fifty feet in front of them, runs a ravine, in the bed of which, and opposite to, and a few rods above the barn, are several natural springs of pure water, from which, at all seasons of the year, flow from two to four inches of water, usual ditch measurement; that before 1856, and about 1854, Stephens had fenced in a garden containing about one quarter of an acre of land lying southerly of, and about one hundred feet from the house, and had constructed a dam sixty feet long, three feet high, costing one hundred dollars, across the ravine below the springs, and fifty feet above the garden, appropriating the waters of the springs to his own use for irrigating the garden; that Stephens had also at the same time erected in the ravine, in front of the barns and two hundred feet from the house, and one hundred feet above the dam, a milk house, costing two hundred dollars, and had so dug out said springs that their waters flowed under, above and around the milk house; that the barns, milk house, etc., were constructed for carrying on the milk business, in which Stephens was engaged, and the waters of the spring were used for irrigating the garden which he cultivated, and also for household purposes. The complaint then avers that in the spring of 1859 plaintiff having acquired all the rights of Stephens by purchase, entered into possession of the premises, and has used the same ever since for the purposes for which they were erected, and as above set forth, and occupied the house with his family as a homestead; that continuously from the time Stephens put up these improvements to the present time, the premises have been occupied and used as above by Stephens or his successors.

The complaint further avers that in March, 1860, defendants wrongfully, etc., entered upon the inclosure around and above the milk house, and excavated a ditch across the same, of capacity sufficient to carry thirty inches of water, usual

ditch measurement, and began digging up the earth twenty feet below the dam, and placed sluice boxes across the inclosure, and avowed their intention to dig away the ground where the milk house stands and where the springs take their rise, and to dig up the bed of the ravine in front of said buildings; that defendants are now engaged in said acts, and threaten to continue so to do, and if this be permitted, plaintiff's dam, milk house and water rights will be totally destroyed, and the earth in the bed of the ravine in front of plaintiff's buildings will be so dug up and washed away as to make a deep ditch, which will prevent plaintiff from crossing the ravine with his animals and wagons from the road to his house, barns, etc., and materially diminish the value of his said buildings, rendering it impossible to use and enjoy them as heretofore, to irrigate his garden, in which are growing a large number of vegetables and fruit trees; that said ditch and sluice boxes are nuisances, and obstructions to the free use of plaintiff's property.

The complaint further avers that for two weeks past defendants have been digging the bed of the ravine about two hundred feet above the milk house, which has caused the mud and sediment to flow down into and around the springs and milk house, so as to render the water unfit for use for household purposes and for irrigation, and that they threaten to continue these acts; that defendants are irresponsible and unable to respond in damages, and that the dam, milk house and water rights are worth \$1,000, and that he has sustained one hundred dollars damages. Prayer for one hundred dollars damages and perpetual injunction.

The answer denies all these allegations—though most of the denials are, that defendants “have no knowledge, etc., and therefore deny”—and then sets up that the premises are exclusively public mineral lands of the United States, and that defendants, as miners, have entered upon them and are working them in a reasonable and proper manner, etc., for the purposes of mining, and are not interfering unjustly with any of plaintiff's rights.

The cause was tried by the court, and the findings were, 1st, that in 1853 Stephens purchased the ranch and took possession thereof, erected the buildings, dam and milk

house, dug out the springs, and fenced the garden, etc., as alleged in the complaint, and that his improvements were worth \$1,000; 2d, that the relative position of these buildings, dam, etc., were as stated in complaint and that there was a road as stated; 3d, that Stephens occupied and used the premises as stated in the complaint until 1856, when he transferred them to B. & B., who occupied and used them in the same way until the spring of 1859, when they transferred the possession to plaintiff, who has since occupied the said buildings as a homestead and used the property for the purposes stated; that the milk house has been kept open, and stock can and have run in and out of it, and that it is in a neglected and bad condition; 4th, that plaintiff had fruit trees growing in the garden, and raised vegetables for farming use; 5th, that the lands are public mineral lands; 6th, that in March, 1860, defendants located the ravine from below the dam, milk house and springs, to about one hundred and fifty yards above the springs, for mining purposes, and began to work and mine the same, and avowed their intention and right to do so, notwithstanding it might injure the milk house, springs, etc.; that they worked the ground in the usual way and in a reasonable manner, and that plaintiff has sustained one dollar damages; 7th, that if defendants mine said ravine, they will dig up the same to the depth of several feet, and will destroy said dam and milk house, and render it necessary for plaintiff to build a bridge to cross the ravine with animals and wagons from his buildings to the road; that the dam, if dug away, could be rebuilt at small expense, and the water still be turned upon the garden.

The court found, as a conclusion of law, that defendants were entitled to judgment for costs, and that the one dollar damages is *absque injuria*. Plaintiff appeals.

TUTTLE & HILLYER, for appellant, cited *Gillan v. Hutchinson*, 16 Cal. 153; *Fitzgerald v. Urton*, 5 Id. 308; *Burdge v. Underwood*, 6 Id. 45.

HIGGINS & HIGGINS, for respondents, cited 5 Cal. 36; Id. 97; Id. 308; *Burdge v. Smith*, 14 Id. 380; *Martin v. Browner*, 11 Id. 12; *Clark v. Duval*, 15 Id. 85.

COPE, J., delivered the opinion of the court, FIELD, C. J., and BALDWIN, J., concurring.

We do not see upon what ground we could interfere with the decision in this case. The prayer for an injunction was addressed to the sound discretion of the court, and we can not perceive that there was any abuse of discretion in refusing to grant it. The case is by no means free from embarrassment, but we should be in danger of doing great injustice if we were to undertake to control the exercise of a discretionary power where it is not perfectly apparent that some provision of law has been violated. It may, in many cases, be a question of great difficulty as to how far the courts should go in extending protection of this character to improvements upon the public mineral lands as against miners, and in such cases the revisionary authority of this court should be exercised with the utmost caution. In the present case, it is evident that the plaintiff will sustain but little damage from the operations of the defendants, and that this damage may be easily repaired. The "milk house," which it is claimed will be destroyed, is an old, dilapidated building, surrounded by no inclosure, and for all purposes of use, neglected and abandoned. The dam used by the plaintiff in the irrigation of his garden may be replaced at a trifling expense, and no injury to the garden will necessarily result from its destruction. The diminution in the value of the premises from the working of the ravine in front of the dwelling house is a mere matter of speculation, and the court below having passed upon it, we are not disposed to interfere. So far as the right of way from the house to the road is concerned, no steps have been taken to secure it against interruption, and the plaintiff has, therefore, no cause of complaint. He might have avoided any difficulty in this respect, by complying with the provisions of the act concerning roads and highways. It does not appear that any of the injuries, for which, if committed, he will be entitled to recover, may not be compensated in damages, and under the circumstances we can not undertake to say that an injunction was improperly refused. It is true the complaint charges that the defendants are insolvent; but this is denied in the answer, and the record does not show that any evidence was introduced upon the subject.

Judgment affirmed.

¹BRENNAN ET AL. V. GASTON ET AL.

(17 California, 372. Supreme Court, 1861.)

Practice in connection with trespass suit. Plaintiffs sued for damages by reason of alleged trespasses upon a certain portion of quartz mining claims, averred in the complaint to be the property and in the possession of the plaintiffs, and alleging further, the insolvency of defendants, asking an injunction against further trespasses, which was granted. The defendants denied all the allegations of the complaint, and averred ownership. The jury found generally for the defendants, but the court below refused to dissolve the injunction: *Held*, 1. That the action amounted to an action of trespass, with an injunction in aid; 2. That the action having failed, the injunction should go with it.

An ancillary writ should abate with the suit which it supported, plaintiffs having failed to prove that which would have been necessary to maintain their suit; even where the action need not be considered as deciding the question of title, nor as debarring plaintiff from proceeding anew for original relief.

Appeal from the Ninth District.

Plaintiffs filed their complaint, alleging that in November, 1859, they found, located, and took up four mining claims, in Shasta county; that they complied with the mining rules and regulations existing in the district, and took possession of and commenced labor upon the said claims; that defendants subsequently entered upon and took possession of a portion of the claims, and committed various trespasses by digging and sinking shafts, mining tunnels, removing quartz rock, washing surface dirt, etc.; and that defendants were insolvent, and asked for an injunction restraining defendants, etc. The judge granted the injunction.

Defendants in their answer denied specifically every allegation in plaintiffs' complaint, and set up that the mining claims upon which the alleged trespasses were committed belonged to them. The case was tried before a jury; verdict for defendants, and judgment rendered in their favor for costs. Subsequently defendants moved to amend the judgment by adding thereto the words "and that the injunction in this case here-

¹ S. C. *post*, p. 426.

tofore granted be, and the same is hereby dissolved." This motion was denied; but the injunction was so modified as to permit defendants to work the surface diggings as set out in their answer.

From the refusal of the judge to amend the judgment as asked for, and from the order modifying and perpetuating the injunction, defendants appeal.

MONSON & SUNDERLAND, for appellants.

The verdict of the jury entitled appellants to a dismissal of the action and to a dissolution of the injunction: *Hoyt v. Carter*, 7 How. Prac. R. 140; *Rutler et al. v. Smith*, 2 Kelly, 265.

R. T. SPRAGUE, for respondents.

BALDWIN, J., delivered the opinion of the court, COPE, J., concurring.

In this case plaintiffs filed their complaint asserting their right to certain mining claims, and complaining of the defendants' unlawful intrusion upon them. An injunction was granted restraining certain acts of trespass done and threatened by defendants, upon an allegation, among others, of the insolvency of the defendants. The case was tried, and a verdict found for the defendants. Judgment was entered in accordance with the verdict. After the rendition of the verdict and judgment, defendants moved for a dissolution of the injunction, but the court refused to grant the motion as made, and made an order modifying the injunction order so as to permit the defendants to work the surface diggings, as set out in their answer. From this action of the court, refusing to dissolve the injunction unconditionally, the defendants appeal.

We regard the action substantially as an action of trespass and the injunction as an order in aid of the action. We can not perceive any reason for continuing the injunction after the main suit has been disposed of. It may be very true that the judgment in trespass does not necessarily determine the title

to the property alleged to be trespassed upon, when that property is real estate; and it may also be true that, upon a proper state of facts, an injunction may be a proper remedy upon a bill in equity, as an original proceeding, to enjoin acts of trespass and waste where the injury is irreparable and goes to the destruction of the inheritance. But this does not affect the question here. The plaintiffs, upon a trial so far, have failed to show that they have any cause of action against the defendants; and having failed in their action, after trial can not claim to retain an injunction which was merely ancillary to that action, and a portion of the remedy for its successful prosecution. If the defendants have, as argued by the counsel for respondents, succeeded only upon the ground that they were entitled to a qualified possession of the premises—that is, to work a portion of the ground as surface diggings—and if the verdict and judgment only affirm this right, and the plaintiffs have the right to the possession of their quartz claims and the land necessary to work them, then any encroachment by the defendants hereafter upon these rights of the plaintiffs can be protected and redressed in due course of law, notwithstanding the verdict and judgment. But as this case is presented to us, we can only regard this as an action of trespass—which is a legal action—and an injunction ancillary to it, and the action of trespass having been decided, the order made in the course of the proceeding falls with the principal matter of which it is an accessory.

The case is remanded that the proper entry may be made pursuant to this opinion.

'BRENNAN ET AL. V. GASTON ET AL.

(17 California, 375. Supreme Court, 1861.)

Ex parte order changing possession. A judge at chambers has no power by *ex parte* order to induct defendants into possession of mining ground held by complainants, although after general verdict for the defendants.

Possession of the subject of controversy is property.

Proceedings in contempt are affected by the invalidity of the original orders.

¹S. C., 7 M. R. 424.

Appeal from the Ninth District.

Action by plaintiffs to recover damages for alleged trespasses committed by defendants upon certain quartz mining claims, alleged to be the property and in possession of plaintiffs; and also to perpetually enjoin defendants from future trespasses. Injunction granted.

Defendants answered, denying specifically all the allegations of the complaint, and setting up ownership of certain mining grounds, described as five hundred and fifty feet by three hundred feet. The case was tried at the November term of the Ninth Judicial District Court for the county of Shasta, 1860, before a jury; and on the sixteenth day of November, 1860, upon a general verdict of the jury for the defendants, the court rendered a judgment against plaintiffs for costs.

The defendants subsequently, on the fifth day of December, 1860, moved the court to amend the judgment of the sixteenth of November, by adding to the judgment the words "and that the injunction in this case heretofore granted be, and the same is hereby dissolved;" which motion was overruled, but the judgment was amended to the extent of modifying the injunction so as to permit the defendants to work their surface diggings, as set out in their answer.

The court finally adjourned for the term on the seventh day of December, 1860. An appeal was taken by defendants, and perfected by filing the requisite notice and bond on the twenty-seventh day of December, 1860. On the twenty-eighth day of December, 1860, defendants filed another bond in the sum of \$1,500, and the judge of said court, at chambers, made an *ex parte* order directing and requiring the plaintiffs to yield the possession of the ground described in defendants' answer, to defendants. This order was, on the same day, by the sheriff, served on one of the plaintiffs, who refused to obey it.

On the twenty-ninth of December, 1860, upon application of defendants, the judge made an order directing the plaintiffs and several other persons named in the application to be summoned to appear on the third of January, 1861, before the judge, at chambers, to show cause why they should not be punished for contempt.

To the summons plaintiffs appeared on the third of January, and filed their answer, denying the authority and jurisdiction of the judge to make the order of the twenty-eighth of December, 1860, or any subsequent orders. Afterward, January 4, 1861, the judge made an order re-affirming the order of December 18, 1860.

Plaintiffs appeal from the order of December 28, 1860, and from the order of January 4, 1861.

R. T. SPRAGUE, for appellants.

The judge erred in making the order of the twenty-eighth of December, 1860, and all other orders made in the case subsequent to the adjournment of the court for the term, on the seventh of December, 1860. He has no power or jurisdiction to make such orders: *Morrison v. Dapman & West*, 3 Cal. 255; *Carpenter v. Hart*, 5 Id. 406; *Robb v. Robb*, 6 Id. 21; *Shaw v. McGregor*, 8 Id. 521; *Bryan v. Berry*, Id. 130; 2d Eden on Injunctions, 3d ed. 425, note 1; *Whippley v. Dewey*, 17 Cal. 314.

A. C. MONSON, for respondents, argued the case orally.

BALDWIN, J., delivered the opinion of the court, COPE, J., concurring.

The orders in this case were irregular. The court had no power to make an *ex parte* order for the restitution of the possession or the induction of the defendants into the possession of the premises in question. This was, in effect, both to decide the whole controversy *in limine*, and to execute the judgment by the compendious process of an *ex parte* order. The judge in chambers could not in this way act upon the matter in controversy; for a possession of the subject of controversy is property, and can not be disposed of except in due course of law; but there is no statute or rule of law of which we are aware which authorizes this act. The subsequent orders dependent upon this partake of its invalidity.

Orders appealed from reversed.

DAUBENSPECK ET AL. V. GREAR ET AL.

(18 California, 443. Supreme Court, 1861.)

¹**Destruction of fruit trees—Perpetual injunction after successive verdicts at law.** Plaintiffs took up land under the Possessory Act of California, inclosed it and planted it with fruit trees. Defendants entered upon the premises, dug a ditch thereon for mining purposes, and washed away and destroyed the trees. Plaintiffs sued for damages, and prayed a perpetual injunction. Verdict, "We, the jury, award the plaintiffs forty-two dollars damages." The court rendered judgment accordingly, but refused to make the injunction perpetual, although the plaintiffs had recovered a similar verdict in a previous suit: *Held*, that the verdict was conclusive of the rights of the parties, and the only remedy from which the plaintiffs could derive adequate relief was by injunction. The injury was irreparable in its nature, and destructive of interests for which no equivalent could be returned.

Appeal from the Fifth District.

Injunction to restrain defendants from entering within plaintiffs' inclosure and digging up and washing away fruit trees, etc., and for damages.

Plaintiffs, some eight years since, took up a tract of about two hundred and twelve acres of land under the Possessory Act of this State, inclosed it and planted it with fruit trees. The complaint avers, in substance, that plaintiffs and those under whom they claim now are and from the year 1852 have been the owners and in possession of a certain tract of land about two hundred and forty feet long by one hundred and sixty feet wide; that in 1857 they planted on said tract one hundred and sixteen apple and peach trees of two years' growth, which are now fruit-bearing trees; that plaintiffs took up, inclosed and hold said land under the Possessory Act of this State for agricultural purposes; that there is on the land a frame house, the residence of one of the plaintiffs, fifteen ornamental trees and a large quantity of shrubbery, which are permanent and valuable improvements; that defendants on the twenty-first of December, 1860, and at other times,

¹*Woodruff v. North Bloomfield Co.*, 1 West C. R. 183; *Brown v. Ashley*, 16 Nev. 312.

entered upon said premises and dug a ditch thereon for mining purposes, thus washing away and destroying the trees, and that they threatened to continue so to do; that these acts if continued will cause irreparable injury, etc.; that defendants are insolvent; that plaintiffs have already sued defendants for similar trespasses and obtained judgment. Prayer for perpetual injunction, and for damages.

The answer denies insolvency, and then substantially sets up that plaintiffs hold as agriculturists only under the Possessory Act, and that defendants, being miners, have a right to enter for mining purposes; that they have paid the judgment against them for the value of trees heretofore destroyed, and have offered and are ready to pay the value of all trees destroyed, which they put at three dollars per tree.

The case was tried before a jury. The evidence is not in the record, but the agreed statement of facts is as follows, to wit:

Plaintiffs, some eight years since, took up a possessory claim under the laws of this State, containing two hundred and twelve acres on the mineral lands, fenced and inclosed the same for the purposes of a fruit orchard, and planted the same with fruit trees.

Defendants, being miners, about four years since took up a mining claim inside this inclosure, consisting of a piece of ground about two hundred feet long by one hundred and thirty feet wide, containing about one hundred and thirteen of these fruit trees, most of them bearing fruit, which was sold by plaintiffs. Defendants having destroyed some of these trees in their mining operations, plaintiffs began suit against them, obtained a temporary injunction, and subsequently a judgment for the sum of forty-two dollars, as the value of the trees destroyed. The court refused to make the injunction perpetual. In pursuing their mining operations, defendants again dug up and destroyed several other trees growing on the same piece of ground, having previously tendered to plaintiffs the value of the trees they were about to destroy, which tender plaintiffs declined to accept, and the money was deposited in court. Plaintiffs again brought suit, and obtained another temporary injunction. The verdict on trial was: "We, the jury, award the plaintiffs forty-two dol-

lars damages." Judgment accordingly. Plaintiffs then moved the court on the pleadings, the foregoing facts and judgment, to make the injunction perpetual against digging up the trees. Motion denied, and an order made refusing to continue the injunction. From which refusal and order plaintiffs appeal.

H. P. BARBER and C. DORSEY, for appellants.

H. O. & W. H. BEATTY, for respondents.

COPE, J., delivered the opinion of the court, FIELD, C. J., and BALDWIN, J., concurring.

There is no doubt that the plaintiffs are entitled to the equitable relief prayed for. The verdict is conclusive of the rights of the parties, and the only remedy from which the plaintiffs can derive adequate relief is by injunction. They are threatened with injuries which must, if committed, result in the destruction of their property, and it is the duty of the courts in such cases to interpose and prevent the perpetration of the injurious acts. We can hardly conceive of a more appropriate case than the present for the administration of this species of justice; the mischief against which the plaintiffs seek protection is irreparable in its nature, and destructive of interests for which no equivalent can be returned. The fact that the defendants are willing to pay for the property is immaterial, for there are no means of determining whether the value of the property in money would compensate the plaintiffs for its destruction. It may possess a value to them which no other person would place upon it; and there is neither justice nor equity in refusing to protect them in the enjoyment of it, merely because they may possibly recover what others may deem an equivalent in money. The nature of the property, which consists of fruit trees, ornamental shrubbery, etc., gives them a peculiar claim to this protection.

The order appealed from is reversed, and the cause remanded for a judgment in accordance with this opinion.

Reversed.

GILLETT V. TREGANZA ET AL.

(13 Wisconsin, 472. Supreme Court, 1861.)

Holder of equitable title, when not entitled to injunction to stay waste. A died intestate in possession of a certain tract of land belonging to the United States, which he claimed as mineral land. Afterward, in 1854, B purchased of the United States said tract and others claimed as mineral lands, under an arrangement with the respective claimants that he should take the title in his own name; that each should furnish money to pay for the land claimed by him, and that B should convey to each. B purchased the tract in question with money of A's estate, furnished for that purpose by C, the administrator (who was also one of the heirs), and in 1856 conveyed said tract to C, as administrator. One of the heirs having obtained from six of his co-heirs conveyances of their interests in said land was, upon petition to the county court of the county where the land is situate, adjudged to be the owner of seven elevenths of the land, which undivided seven elevenths were by said decree assigned to him. The last named heir brought suit to recover possession of his interest in the land, and prayed for a temporary injunction to restrain the defendants from digging and committing waste upon the said tract during the pendency of the suit. The injunction was granted, but afterward on motion of defendants was dissolved, and the plaintiff appealed from this order: *Held*, that the legal title was in C, and not in the heirs, and that as it appeared from the complaint that the plaintiff had only an equitable title, and that no final judgment in his favor could be had, he was not entitled to the temporary injunction.

Waste and ejectment, being legal remedies, can only be maintained by the owner of the legal title—not by the *cestui que trust*.

Variance—Cestui que trust suing as if he held the fee. Although the equitable owner may be entitled to have the waste of his land enjoined, such relief can not be granted in an action where he claims to hold the legal title and proves only an equitable estate.

Prayer determines nature of action under code. In actions brought since the adoption of the code, it is a general rule that the nature of the action is to be determined by the prayer for relief; and this rule may be safely adopted in cases of doubt.

Appeal from the Circuit Court for La Fayette County.

The facts alleged in this case are in substance as follows: In 1848 one Benoni R. Gillett died intestate, leaving the plaintiff, William W. Gillett, with eight brothers and two sisters, his only heirs at law. At the time of his death said Benoni was in

possession of and claimed as mineral lands the whole of the tract in question, the title to the same being in the United States. In 1852 Philo Gillett was duly appointed administrator *de bonis non* of said Benoni. In 1854 the tract in question, and others claimed as mineral lands, were offered for sale by the United States government; and one Crawford became the purchaser and took the title thereto, under an arrangement with the claimants that each of them should furnish sufficient money to pay for the land claimed by him, and that Crawford should afterward convey to each the land by him claimed. Philo Gillett furnished Crawford the money to pay for the tract in controversy out of moneys belonging to said estate. In 1856 Crawford conveyed said tract to Philo Gillett as such administrator, and the complaint alleges that said Philo thereby became possessed of the legal title in trust for the heirs of said Benoni. The plaintiff, in 1854, purchased the shares of said estate owned by six of the other heirs. In 1857 the County Court of La Fayette county, on petition of the plaintiff, made an order declaring him to be the owner by purchase of six elevenths, and by inheritance of one eleventh; of said estate, including the tract in controversy, and that the undivided seven elevenths of the same were thereby assigned to him. On the 15th of March, 1858, the defendants were in possession of a portion of said tract and were digging and committing waste thereon; and the plaintiff on that day caused a written demand to be served on them, requiring them to quit digging, etc., but they still continued, at the time of the commencement of this action, to unjustly hold possession of the premises and commit waste thereon. Subsequently to this demand the plaintiff purchased the interest of another of the heirs in said land. In May, 1860, the plaintiff served upon the defendants another demand and notice similar to the above. The complaint demanded that the defendants might be restrained from further digging on any part of said premises, and from removing any ore or mineral therefrom, or in any manner interfering therewith, *until the further order of the court*, and that the plaintiff might recover from the defendants the undivided eight elevenths of said piece of land and all damages by him sustained by occasion of the premises.

The county judge of La Fayette county granted a temporary injunction according to the prayer of the complaint. The defendants demurred to the complaint on the ground that it showed the legal title to the land in question to be in Philo Gillett and not in the plaintiff, and that it did not state facts sufficient to constitute a cause of action. Afterward the circuit court, on motion of the defendants, made an order dissolving said injunction, from which order the plaintiff appealed.

SLEEPER & NORTON, for appellant, made the following, among other points: 1. The purchase with trust funds, by the administrator *de bonis non*, and the conveyance to him as administrator, created the relation of trustee and *cestui que trust*, and the statute of uses and trusts executed in *eo instanti*, and vested in each of the *cestuis que trust*, "a legal right, cognizable as such in the courts of law": R. S. 1849, Chap. 57, Secs. 1 to 9, and Chap. 69, Secs. 12-15; *In the matter of Dekay*, 4 Paige, 403. 2. Whether this be so or not, the order of the county court assigning seven elevenths of this land to the plaintiff, not only declared the title to be in him, but vested in him at once the right of possession as against the administrator; and as against these defendants no such decree was necessary, unless they showed that they were in possession under the administrator.

CRAWFORD & SIMPSON, for respondents. No argument on file.

By the Court, DIXON, C. J.

If we could concede that the appellant's counsel are correct in their position that the facts stated in the complaint show the legal title of the land in question to be in the appellant, it might then be unnecessary for us to inquire into the true nature and object of the present action. For, if that position were correct, such inquiry would be immaterial, inasmuch as the restraining of the commission and continuance of the acts of waste of which complaint is made, pending the litigation, would be an appropriate means of relief, whatever

might be the particular form of the action. If it were an action of waste, it could be properly granted under section 7 of chapter 143 of the Revised Statutes, or under section 2 of chapter 129; if an action for the recovery of land, under the latter section also. If it were a proceeding by the party beneficially interested, addressed to the equitable powers of the court, asking its aid to stay and prevent the commission of further acts of waste or injuries permanently affecting the freehold, it might then be granted by virtue of the general authority of a court of equity, or under the provisions of the last named section. But since we can not agree with the counsel in saying that the complaint shows that the legal title is in the plaintiff, it becomes important in forming an opinion upon the correctness of the order of the circuit court dissolving the temporary injunction, to consider and determine the kind of action which he has brought. For, in this view of the case, the equitable proceeding is the only one open to him. The actions of waste and ejectment, being legal remedies, must be brought by the person legally interested in the property, and can not be maintained by a *cestui que trust*, or other party having only an equitable interest: 1 Chitty's Pl. 2, 60, 189 and 190. If, therefore, the action belongs to either of these classes, we take it to be clear that the appellant is not entitled to this temporary relief, as it can not be supposed that the legislature intended that such temporary injunctions should be issued in cases where it is evident, from the plaintiff's own statements, that he can not maintain the action, and that no final judgment in his favor can be had. What, then, is the action which the pleader has attempted to set forth in his complaint? Is it the equitable proceeding? Or is it an action to obtain damages for wrongs and injuries already committed? Or does he seek to recover the land itself? Upon his hypothesis, that the appellant is the owner in fee, the facts stated are sufficient to enable him to maintain either of these three forms of action; but according to our understanding, that he is merely a *cestui que trust*, he can only maintain the first. Under our present system, in which the distinction between actions at law and suits in equity, and the forms of all such actions and suits as they heretofore existed, are abolished, the test by which we are to determine the character of

actions, in those cases where the facts stated indicate either of two or more actions, must be the relief demanded. Mr. Whittaker, in his Treatise upon Practice and Pleading under the Code, Vol. 1, § 124, lays it down as a general rule that the nature of the action is to be determined by the prayer for relief. We may, at least, safely adopt this rule in cases of doubt, and in cases like the present, where the pleader, conceiving himself entitled to prosecute either of several actions, has so stated his facts as to leave it uncertain which he intended to pursue. Looking to the prayer for relief, we find very clearly that it is not the proceeding in equity. There is nothing in it which at all indicates that he seeks an injunction as a permanent measure of relief. On the contrary, it is very plain that he seeks it merely for the purpose of restraining the commission of further acts of waste during the pendency of the suit, and as a mode of redress which is incidental and subservient to the main object of the action. No judgment that the defendants may be finally and perpetually enjoined, is asked, but the prayer is that they may be restrained until the further order of the court. The complaint then proceeds to demand a recovery from the defendants of the land in controversy, and of the damages which the plaintiff alleges he has sustained by reason of the several acts of waste complained of, besides the costs of his suit. The concluding portion of the prayer makes it certain that the action is brought either for the land or the damages, and although they may not both be joined in one action, it is yet unnecessary for us to decide for which, since neither can be maintained by a person not having the legal title.

In support of our opinion that the appellant has not the legal title to the land, we may say, that the complaint shows that it was acquired by Philo Gillett, administrator *de bonis non* of the estate of Benoni R. Gillett, deceased, and that no conveyance by him to the plaintiff or any other person has ever been made. It is expressly averred that the legal title was in Philo Gillett, "but in trust, nevertheless, for the heirs of Benoni R. Gillett."

The only claim of title in the plaintiff is founded upon the facts that the land was purchased with funds belonging to the estate of the deceased, of whom the plaintiff and Philo

Gillett, the administrator, together with nine other persons named were joint heirs; that after the conveyance to Philo Gillett the plaintiff purchased and had conveyed to him, by deeds duly executed, and delivery by each, the shares of six of the other heirs; that after such purchase he presented his petition to the County Court of La Fayette county, praying that seven elevenths of the estate might be assigned to him; that upon such petition such proceedings were, among other things, had in due form of law; that he was declared, ordered and adjudged to be the owner of seven elevenths of the estate, including the land in question, and that he afterward purchased and had conveyed to him the share of Leonard F. Gillett, one of the heirs of the said deceased. It is likewise stated that Benoni R. Gillett, in his lifetime and at the time of his death, was in possession of the land in question, claiming the same as mineral lands, the title hitherto being in the United States; but as that statement can in no wise affect the question of legal title, it need not be noticed. Upon these statements it may well be admitted that the appellant is the equitable owner of the undivided eight elevenths for which, or the damages to which, this action is brought, but it certainly can not be contended that they show him to have any legal interest whatever. The debts and charges being paid, and the affairs of the estate otherwise closed, as must be presumed from the fact of a decree of distribution having been made, there can be no doubt of the existence of the trust, and that a transfer may be enforced by the parties beneficially interested: Sec. 9, chapter 57, R. S. 1849. But until the trust is executed and the legal title transferred to the heirs or others entitled to their interests, the trustee remains, at law, the owner. Nor can the decree of the county court be said to have at all affected the matter. It at most only ascertained and declared the shares or parts of the estate to which the several heirs or their representatives or assigns were entitled, so as to enable them to demand or recover them from the administrator or other person having the same: Sec. 3, chapter 72, R. S. 1849.

It did not purport to affect or transfer the legal title to any estate or lands, but to settle and determine the rights and interests of those persons to whom the lands of which the intestate died seized, descended upon his death, and in whom

the legal title then was. This was the extent of the authority conferred upon the county court, and the utmost effect which can be given to such decree with regard to the lands in question, is that, as between the plaintiff and the other heirs and the trustee, it may be conclusive of the extent of their respective equitable rights and interests.

It is needless for us to enter into any discussion as to how the title would have been affected by a decree of partition by the county court under the statute referred to (Sec. 18, chapter 72, R. S. 1849), the administrator and trustee being one of the heirs and a party to the proceeding, since it is not alleged that any such partition was ever adjudged. A reference to some authorities bearing upon that question will be found in the case of *Nash v. Church*, 10 Wis. 303.

The order of the circuit court is affirmed.

ELWELL V. CROWTHER ET AL.

(31 Beavan, 163. The Rolls Court, 1862.)

¹ Water supply threatened, but not yet affected, by continued mining.

By mining operations the defendant had not only sunk the level of a stream supplying plaintiff's mill, but also the level of the adjoining land. Plaintiff filed a bill for an injunction, but there had been as yet no actual diminution of the water to the mill, though threatened: *Held*, that the bill ought not to be dismissed, but should stand with leave to apply further; the defendant meanwhile to give an undertaking not to diminish the flow.

A stream of water, called "The Mill Fleam," flowed from a place called Peck Mill, through the defendants' land and then through land of the plaintiff to Wednesbury Forge, which also belonged to the plaintiff. This stream there turned a mill and supplied the motive power for the machinery working the forge.

This stream had been granted in 1765, by the former owners of the defendants' lands, to persons through whom the plaintiff was entitled.

The deed of 1765 granted, with other property, "all that trench, watercourse or aqueduct, cut or made," through the

¹ *Nevada Co. v. Kidd*, 37 Cal. 282.

grantor's lands, with full liberty to rid, scour and cleanse the watercourse and "to lay the dirt and rubbish on the banks thereof," with certain rights to the grantees of flooding their meadows at stated times.

The defendant, Crowther, by his tenant Mills, had worked the ironstone under and on both sides of the stream under the defendants' land, by which the surface land adjoining the stream and the bed of the stream itself had become depressed to the extent of four feet.

The plaintiff instituted this suit in July, 1861, against Crowther and his tenant Mills, alleging that the flow of water to the Mill Fleam had been materially interfered with and impeded, and the supply of water to the forge diminished, so as to cause considerable injury and damage to the plaintiff; that Mills had also nearly completed the erection of a stone wall on one side the Mill Fleam, and a mud wall or embankment on the other side. The plaintiff alleged that these injuriously affected his property and that they prevented or interfered with the cleansing and clearing the watercourse, which would in times of flood, by overflowing the banks of the Mill Fleam, prevent the escape of the flood waters as they had been accustomed to escape.

The plaintiff stated that the water thus collected and confined within a narrow channel between the wall and the embankment would break down or undermine them, whereby he would be deprived of the use of the stream, or, at all events, that the natural and usual flow of water would be seriously obstructed or diminished.

The plaintiff also complained that the Peck Mill weir had sunk; and he claimed not only relief, but also the intervention of the court in respect of what was passed, as well as to prevent irreparable injury to the watercourse, which the plaintiff considered must inevitably ensue if the defendants continued to work the mines as they had recently worked them and as they threatened and intended to do.

The defendants said that if the surface of the land and the bed of the Mill Fleam had sunk, still that it would, in a short time, permanently settle, and would then sink no further; that the sinking was very gradual and perfectly equal, and that it would not do the slightest injury to the Mill Fleam, or prevent the supply of water to the plaintiff's forge. The de-

defendants positively denied that the plaintiff had sustained any actual damage in the supply of water, and stated that Mills, to prevent the escape of water from the Mill Fleam, had at great expense embanked the Mill Fleam in the most approved manner, and that so far from such embankment and wall injuriously affecting the plaintiff's property and the cleansing of the watercourse, the latter was now wider and deeper than it was before and more easily cleansed or cleaned; that such embankment and wall had been properly made so that when the soil of the Mill Fleam had subsided, in consequence of getting the ironstone under it, the water, which would be kept in its original level by weirs at other parts of the Mill Fleam, would be, as nearly as possible, at the same distance from the top of the embankment and wall, as it would have been from the top of the banks of the Mill Fleam, if they had not been made and such subsidence had not taken place. The defendants also said, that as the bed of the Mill Fleam and the surface of the adjacent land would not sink more than four feet, and that as it must sink in a perfect level it would not materially, or to any extent whatever, affect or obstruct the flow and passage of water in and along the Mill Fleam if proper embankments were made, as they had been up to that time and were intended to be for the future. The defendants further said, that the plaintiff had visited the spot with Mills in August and October, 1860, to consider the precautions necessary to prevent any injury to the Mill Fleam, or any diminution in the supply of water to the mineral works, and they insisted that the plaintiff had acquiesced in the erection of the wall and of the embankment.

The bill prayed an injunction to restrain the defendants from working the mineral in "the soil of the plaintiff" under the Mill Fleam.

2. An account of all minerals worked by the defendants out of the plaintiff's soil.

3. An injunction to restrain the defendants from working their mines in such a manner as to cause any lowering of the level of the bed of the Mill Fleam, or so as to obstruct or diminish the flow of the water.

4. An injunction to restrain the defendants from permitting any wall or embankment along the bank of the stream, which would obstruct the cleansing of the watercourse, or in-

terfere with the free escape of the flood waters over the banks.

5. For damages.

Mr. LUSH, Mr. BAGGALLAY and Mr. C. HALL, for the plaintiff.

Mr. FOLLETT and Mr. DRUCE, for the defendant Mills.

Mr. SELWYN and Mr. SOUTHGATE, for Crowther.

THE MASTER OF THE ROLLS.

The object of the suit is, first, to restrain the mining under the stream; secondly, to restrain the working of the mine in such manner as to lower the bed of the stream, and obstruct the flow of the water; thirdly, to restrain the erection of the wall and banks, so as to obstruct the cleansing of the stream. It will be necessary to consider these three parts of the case separately.

With respect to the first part, not only is there no evidence that the plaintiff is entitled to the minerals, but the evidence is all the other way. On the construction of the deed itself, as a conveyance, it is obvious that counsel have very wisely abandoned the idea of pressing on the court any right to the minerals, or the soil under the stream, the consequence of which necessarily is that this part of the case, which has been abandoned, must be treated as a matter in which the plaintiff has altogether failed, and with respect to that the bill must be dismissed with costs.

The next question is to consider what ought to be done with the second branch of relief prayed. With respect to that the circumstances are very peculiar; it is admitted that the working of the ironstone under the soil has produced a sinking of four feet of the level of the soil for a considerable distance along the mill stream. I am not sure that it is quite uniform in all places, but it is quite clear that there has been a sinking of four feet. The plaintiff also contends that there has been a sinking of the Peck Mill weir, and he also asserts that there has been a damage to him by the diminution of the flow of the water. The plaintiff has no right whatever to the soil of the river or to any minerals under the bed of the stream, and the whole of his interest is confined to the proper supply of water to his mill; and provided that is not inter-

ferred with and that the court has a reasonable certainty that it will not be interfered with, the plaintiff has everything that he is entitled to, if he be not put to any unusual or unnecessary expense in maintaining his rights. There is no evidence that there has been any diminution of the water of the mills, and though there has been a general allegation, which would not be sufficient under any circumstances, yet if it were capable of proof, it would have been proved by some person showing short working on some day or another. Consequently I think that the plaintiff has not been damaged in this respect.

As to the sinking of the Peck Mill weir, I confess my inability to come to a satisfactory conclusion upon that point; there has been a good deal of contradictory evidence upon the subject. The two weirs which are compared together and which are the standard by which the sinking of Peck Mill weir is professed to be ascertained are a mile apart, and the utmost sinking was said by one person to be ten inches; but it is a question of an inch or a portion of an inch, which, with the most accurate measurement, at that distance, must be very liable to error, and it would be very difficult for the court to act upon it. Neither can I act upon a comparison of the flow of the water over the various weirs on the same day and at the same time. To any person at all acquainted with water in its natural state, it is obvious it must be lower at a particular spot at one time than at another, and that a little wind or a little extra current or any like circumstances might cause the water to run in a greater volume to their mill weir at one time than it would at another. I can not come to any conclusion upon that subject, and I must therefore hold that the plaintiff has not proved that there is any lowering of the water at the Peck Mill weir, and he certainly has not proved that he has sustained any damage in the diminution of water by reason of the lowering of that weir.

Upon this it was argued, for the defendants, that when a person comes for an injunction to restrain an injury done to him, he must either prove that the injury has actually happened or that it is inevitable, and that without that the court would dismiss the bill. That may be justly said as a general proposition, but it is not applicable to this case. Here it is an admitted fact, that the working of the ironstone under the

surrounding ground has lowered the level of the surface of the ground in the bed of the Mill Fleam to the extent of four feet, and it is manifest that if the water had remained there, and if the defendants had done nothing, this fact would most seriously have obstructed the flow of the water to the mill; in truth it is the common case, and it is clear, upon the evidence, that the water would have flowed over the plaintiff's meadows, and that the raising of the banks was absolutely necessary for the purpose of preventing it. It is true that the defendants did raise the banks for that purpose; but I do not know that the plaintiff could compel them to do so, except through the authority of this court, declaring that they must not do anything to obstruct the flow of water to the plaintiff's mill, the right to which flow of water is unquestioned and unquestionable.

I can not certainly say, by applying to this court, that a man has acted with undue precipitancy or undue haste who finds that the soil for half a mile, through which the stream which supplies his mill runs, has by reason of the working underneath that ground, sunk four feet. A plaintiff has to contend with great difficulty in these cases, between the double imputation which may be made upon him of precipitancy on the one hand and acquiescence on the other. Here, practically, the defendants impute both, for they say: "The plaintiff ought not to have come before he had sustained any damage, and he has sustained no damage;" and next they say, that he examined the mode in which they were making the banks, and gave advice respecting it, which was followed, and that this amounted to an acquiescence in the continuance of that mode of working. I am of opinion that it was neither the one nor the other; that he has neither shown undue precipitancy in coming to the court when so great a sinking had taken place, and he is not bound by the acquiescence which is imputed to him by the defendants; at the same time I think that he has sustained no damage at present, and that he will sustain no damage, provided the defendants will continue to do what they have hitherto done, and that nothing more occurs. I do not think that the court ought to leave it entirely to accident whether the defendants will continue to do what they have hitherto done, without being ready to inter-

pose for the assistance of the plaintiff in that respect; and therefore, if there had been nothing further in the case and the parties could not have settled the matter amicably, the plaintiff would have been entitled to an injunction to restrain the working of the mine in such a manner as to obstruct, diminish, alter or interfere with the flow and passage of the water or the supply thereof in and along the watercourse.

I am of opinion that it has not been interfered with yet, and what I propose to do with respect to this part of the case is this: considering that the defendants appear to be doing everything that is in their power to prevent the diminution or obstruction of the water to the plaintiff's mill, and that, on the one hand, I ought not to make any hostile decree against them on that subject, and considering, on the other hand, that so serious an alteration has taken place in the level of the earth as a subsidence of four feet, and that nobody can tell, except by a sort of conjecture which this court can not act upon, what may be the result, I think I ought not to make a hostile order against the defendants. I do not, therefore, propose to give any costs of that portion of the bill, but to require the defendants to give the following undertaking:

"The defendants undertaking not to work their mines in such a manner as to obstruct, diminish, alter or interfere with the flow and passage of the water and the supply thereof in or along the said watercourse, let all further proceedings in the suit be stayed, giving liberty to apply, but giving no costs and making no further order in the matter."

With respect to the third part of the prayer of the bill, which relates to the wall and the embankment, I am of opinion that I ought to make no order at all. If the banks are not raised to such a point, or are raised to such a point as either to produce too much water or to diminish the quantity of water which ought to flow to the plaintiff's mill, he will, under general liberty to apply reserved to him, be entitled to come here to claim that right. With respect to the scouring of the watercourse, I am of opinion that this right was merely for the purpose of obtaining a due supply of water to the mill, and that if, by any acts of the defendants, the plaintiff is impeded in doing anything necessary for that purpose, for instance, if by acts of the defendants

the bed of the watercourse is lowered or its banks raised, then that shifts the burden, and it would become necessary for the defendants to act so as to prevent the obstruction of the flow of water to the plaintiff's mill. In that respect, liberty to apply will also be sufficient in case that event arises, but at present, I have no reason to suppose, if the defendants act as they have hitherto acted for the protection of the Mill Fleam and the banks, that such an event will occur. At the same time, no person can speak with certainty as to what may happen in respect of that matter, and the plaintiff is entitled to have the assistance of this court, and if that event should happen he must be at liberty to come here at a moment's notice.

I think that this court can not properly dismiss the bill altogether, and leave the plaintiff to file a new bill. If, for instance, in working the minerals a crack in the soil at the level of the ironstone, or any other like calamity, which is now anticipated, should occur to injure this stream, he would then be told that he had long been aware of what would happen, and ought to have applied sooner.

Therefore, the course I shall take is this: I shall dismiss the bill as to working under the Mill Fleam, and the account of the minerals worked, and as to the rest I shall, upon the defendant giving the undertaking I have stated, retain the bill, staying all further proceedings, and give liberty to all parties to apply, but I shall make no order as to the costs of the latter matter.

If the defendants should not give the undertaking, I shall then grant the injunction in the terms I have stated.

McLAUGHLIN ET AL. V. KELLY ET AL.

(22 California, 212. Supreme Court, 1863.)

¹ **Injunction after recovery in trespass.** The complaint averred that defendants unlawfully entered upon certain mining ground owned by plaintiffs, and mined out large quantities of gold, of the value of \$1,000, and that defendants were wanton trespassers, and concluded with a prayer for judgment for \$1,000 and an injunction. The answer averred that defendants were the owners of a certain portion of the ground de-

¹ *Daubenspeck v. Grear*, 7 M. R. 429.

scribed in the complaint, and denied that defendants had worked any ground except that to which they claimed title. The cause was tried by a jury, who found "a verdict in favor of the plaintiffs, with one dollar damages." The court thereupon rendered a judgment in favor of plaintiffs for one dollar, without costs, and ordered the temporary injunction which had been granted to be dissolved: *Held*, that the verdict of the jury decided the question of title in favor of the plaintiffs, and that the refusal of the court to grant a perpetual injunction was error.

Verdict upon matter not in issue. The court instructed the jury: "The answer in this case admits that defendants have extracted gold of the value of \$1,000 from the ground claimed by plaintiffs, * * and if the jury believe from the evidence that plaintiffs, at the time of the alleged trespass, were entitled to the possession of such ground, they should find a verdict in favor of plaintiffs for \$1,000 damages": *Held*, that because the jury found a verdict for one instead of one thousand dollars, we are not therefore to conclude that they did not find that the plaintiffs were entitled to the mining ground in dispute. There was no issue upon the question of damages, and that part of the verdict was upon a matter not properly before the jury.

¹**Injunction which ends controversy not refused.** In an action of trespass in which the title has been litigated, it is no reason for refusing a perpetual injunction that it would conclusively settle the title to the ground in dispute, and estop defendants from recovering any portion of the ground in another form of action. The principal object of actions is to produce just such a result; that is, to finally settle the controversy.

²**Effect of verdict.** If in an action of trespass the jury find generally for the plaintiffs, it concludes the parties upon all questions material to the recovery of plaintiffs, which are distinctly put in issue.

The Practice Act of California abolishes all forms of action, and under it we must look solely to the material facts put in issue by the pleadings, to ascertain what was in fact determined by the findings of the court or the verdict of the jury.

Appeal from the Seventeenth Judicial District.

The nature of the action and the character of the issues raised by the pleadings are fully stated in the opinion. The form of the allegation of damage in the complaint, following a description of the entire premises claimed by them, is that defendants "then and there," with picks, etc., "dug, mined out, removed, and converted to their own use, divers large quantities of gold and gold-bearing earth, and gravel of great value, to wit, of the value of \$1,000," to the damage of plaintiffs in that sum. The only reference to the subject of damage in the answer is a denial that defendants have done any work west of the line as claimed by them.

¹ *Denver v. Lobenstein*, 3 Colo. 216.

² *Outram v. Morewood*, 5 M. R. 484.

The statement of the evidence on the trial, as set forth in the record, is as follows: "Whereupon a jury was regularly impaneled to try the cause, and the parties respectively introduced testimony in support of the issues on their part. It was in evidence, that defendants had worked and mined in that part of the mining ground claimed in the complaint and replication, and lying east of the Carter line, running north fifty-seven degrees and forty-five minutes west (the line claimed by defendants). There was evidence tending to prove that defendants had run an air tunnel through a portion of plaintiffs' ground west of said Carter line, and that this last mentioned tunnel was run by the consent of the plaintiffs; also that in working along said line, the defendants had in several places broke over the same and caved down a little dirt from the west side thereof, and at the same time plaintiffs told defendants they need not be very particular about the line or about going over the line."

The instructions were almost entirely directed to questions respecting the title to the triangular piece of ground put in issue by the pleadings. In each of three instructions given at request of defendants, the jury were told that, upon a certain hypothesis of facts respecting title to the triangle above mentioned, they must find for defendants, "unless they find that defendants worked on the west side of the Carter (N. 57° 45' W.) line." On the subject of damage the court instructed as follows: "The answer in this case admits that the defendants have extracted gold of the value of \$1,000 from the ground claimed by plaintiffs in their complaint, and during the time therein alleged, and if the jury believe from the evidence that plaintiffs at the time of the alleged trespass were entitled to the possession of such ground, they should find a verdict in favor of plaintiffs for \$1,000 damages."

The verdict was as follows: "We the jurors in the case of *Chas. McLaughlin v. Peter Kelly et al.*, do find a verdict in favor of the plaintiffs, with one dollar damages.

"L. W. KEYES, Foreman."

TAYLOR & COWDERY and WILL CAMPBELL, for appellants.

VANCLIEF & BOWERS and A. I. WILLIAMS, for respondents.

CROOKER, J., delivered the opinion of the court, COPE, C. J., and NORTON, J., concurring.

The complaint in this case avers that the defendants unlawfully entered upon certain mining ground owned by the plaintiffs and in their possession, and mined out, removed and converted to their own use large quantities of gold and gold-bearing earth, of the value of \$1,000; that the defendants have no right to said mining ground, but are wanton trespassers thereon; that they are still mining the ground, the sole value of which consists of the gold therein; that unless restrained, they will mine out the best and most valuable portion of the ground before the determination of the suit; and concludes with a prayer for judgment for \$1,000, for a temporary, and, on the final hearing, a perpetual injunction, and for general relief. The answer of the defendants denies that the plaintiffs ever were the owners or in the possession of the *whole* of the mining ground claimed in the complaint, or of any portion upon which they, the defendants, have ever mined, or from which they have ever removed any gold or gold-bearing earth of any value. They aver that they are the owners and in possession of certain mining ground in the same vicinity, which they describe, and then deny that they have ever mined or removed any gold-bearing earth from any part of the ground described in the complaint, except so much thereof as may be within the boundaries of their own claims, to which plaintiffs had no right, title or possession. The replication denies that the defendants owned or possessed the premises described in the answer, or any portion thereof, except such portion as may lie easterly of a line drawn from a certain stake, mentioned in the description of defendants' mining ground, and running north forty-eight degrees forty-five minutes west by magnetic meridian, but on the contrary plaintiffs are the owners and possessors of the ground lying westerly of said line. The pleadings are duly verified. The cause was tried by a jury who found "a verdict in favor of the plaintiffs, with one dollar damages." A temporary injunction had been granted at the commencement of the suit. The court rendered a judgment in favor of the plaintiffs for one dollar, without costs, and ordered the temporary injunc-

tion to be dissolved. The plaintiffs asked the court to render a judgment upon the verdict for one dollar, with costs, and for a perpetual injunction against mining the ground described in the plaintiffs' complaint, which was refused by the court, and to which the plaintiffs excepted, and they prosecute this appeal from the order dissolving the temporary injunction and the refusal to grant the perpetual injunction.

It appears that these parties own adjoining mining grounds, and that the premises in dispute is a gore of land, lying between the undisputed portions of their respective claims, the plaintiffs' claim lying westerly and the defendants' easterly of this gore. This disputed piece of land lies between two lines, both commencing at a certain stake, the one line running from this stake north forty-eight degrees forty-five minutes west, and the other north fifty-seven degrees forty-five minutes west, a difference of nine degrees; the plaintiffs claiming that their mining ground extends to the former line, while the defendants claim that theirs extends to the latter line. This issue is clearly, plainly and distinctly presented by the pleadings, and the plaintiffs contend that as the verdict was for them, this issue was found by the jury in their favor; that they were therefore entitled to a perpetual injunction, restraining the defendants from mining upon any portion of the ground described in their complaint, and that the court erred in refusing it. A careful examination of the pleadings clearly shows that the question of ownership of this gore of land was, in truth, the main fact in issue in the case. All the other material allegations were not denied, and were therefore admitted. Even the question of damages, which was passed upon by the jury, was not in issue, because the allegation of the complaint on that point was not specifically denied by the answer. The plaintiffs averred that they were the owners of a certain tract of mining ground, describing its boundaries, which include the gore in controversy; the defendants deny that the plaintiffs are the owners of this gore, and aver that they own a piece of mining land, describing it, which includes it. If a question of ownership and title was ever put in issue in any case, they certainly were in this; and when the jury by their verdict found for the plaintiffs, they clearly found this issue for them. None of the

allegations in the complaint on which the injunction prayed for is founded are denied by the answer, and they are therefore admitted; and the only issue of fact being found for the plaintiffs, they were clearly entitled to that relief.

But it is objected by the respondent that the perpetual injunction would conclusively settle the title to all the ground described in the plaintiffs' complaint in favor of the latter, and forever preclude and estop the defendants from disputing it, or recovering any portion of the ground in any other action, and therefore it ought not to be granted. Very probably such would be the result. Such is usually the result of trials where a question of fact, material to the determination of the suit, has been fairly tried and a verdict and judgment has been rendered thereon. The principal object of actions is to produce just such a result; that is, to finally settle the controversy and put an end to litigation and strife. When there has been a fair trial of such an issue, courts usually give the verdict and judgment a final and conclusive effect, and will not permit the parties, or those claiming under them, to relitigate the same matter in another suit: *Loring v. Illsley*, 1 Cal. 28; *Soule v. Daves*, 14 Id. 249; *Kidd v. Laird*, 15 Id. 162; *McDonald v. The Bear River and Auburn Water and Mining Co.*, Id. 145; *Robinson v. Howard*, 5 Id. 428; 2 Phillips' Evidence, C. H. & E.'s Notes. 18, notes 261, 262.

It is also urged that the verdict of the jury *may* have been founded upon other matters than the ownership of the gore of land in controversy; and this is more especially insisted on because the jury found only one dollar damages. The finding of the jury "for the plaintiffs" was upon all the issues in the pleadings, and, as we have shown, the only issue upon any material fact was as to the ownership and possession of this particular strip of land, and this verdict was clearly against the defendants upon that matter. As to the amount of damages found by the verdict, it was entirely immaterial, and surplusage. There was no issue upon the question of damages presented by the pleadings for the jury to try, and that part of their verdict was, therefore, upon a matter not properly before them. The answer not containing any specific denial of the amount of damages alleged in the complaint, those allegations were therefore admitted, and there was no

issue upon that question. We have no right to say that the jury founded their verdict upon matters not in issue. So with regard to the instruction of the court that, if the jury should find that the plaintiffs were entitled to the mining ground they must find a verdict for \$1,000 damages upon the admissions of the answer. That instruction was upon an irrelevant and immaterial matter, one not for the jury to act upon. The amount of damages being admitted by the answer took that question entirely from the jury. Because the jury did not bring in a verdict for \$1,000 damages, in accordance with that instruction of the court, we are not therefore to conclude that they did not find that the plaintiffs were entitled to the mining ground in dispute, in direct contradiction to their verdict.

The question before us is not as to the conclusiveness or effect of this verdict upon the issues presented by the pleadings, or the judgment which may be rendered upon the verdict, as an estoppel or bar in another action, but simply what relief, or what kind of a judgment the plaintiffs are entitled to under the pleadings and verdict; whether they are entitled to such relief as will quiet and settle the controversy about this mining ground, or whether they shall be compelled to bring repeated suits for each trespass which may be committed by the defendants. We are clearly of opinion that under the pleadings and verdict they are entitled to the relief by perpetual injunction, as prayed for in the plaintiffs' complaint.

It is also urged that the form of the action is to govern in questions of this kind. We are aware that under the old system of practice the conclusiveness and effect of general verdicts, and the judgments rendered thereon, depended very much upon the particular *form* of the action. But our Practice Act abolishes all these *forms*, and provides that "there shall be in this State but one form of civil actions for the enforcement or protection of private rights, and the redress or prevention of private wrongs." And the pleadings are merely required to set forth a statement of the facts constituting the cause of action or defense "in ordinary and concise language." It has become a common practice to follow and use, to some extent, the form of allegation of facts formerly used in the different kinds of actions under the old system; but such use can not

vary the uniform rule which must be applied to all pleadings under the new code. We must now look solely to the material facts put in issue by the pleadings, to ascertain what was in fact determined by the findings of the court or the verdict of the jury. The mere fact that the pleader has used terms of expression in stating his case used in particular kinds of action, under the old system of practice, will not necessarily give character to or determine the effect or meaning of the verdict. It is therefore unnecessary to investigate this question by an examination of the cases founded upon these old distinctions of the different forms of actions.

The orders appealed from are therefore reversed, and the court below is directed to enter judgment for a perpetual injunction, in accordance with this opinion.

Reversed.

**THE REAL DEL MONTE CONSOLIDATED GOLD AND
SILVER MINING COMPANY V. THE POND GOLD
AND SILVER MINING COMPANY.**

(23 California, 82. Supreme Court, 1863.)

¹ Denial of equities—Affidavits. If the answer to a bill for injunction to restrain mining upon a quartz ledge claimed by both parties, denies all the equities of the bill, and the bill is not supported by affidavits, the injunction must be dissolved.

Restraining party claiming title—Laches—Expenditures. If a mining company has been in possession of a quartz ledge for several months, expending large sums of money in working it as their own, it will require a strong showing to induce a court of equity to grant or sustain an injunction to stop the work. There must be an urgent necessity, and the title of plaintiffs must be shown to be clear, and not in dispute.

Title in dispute—Inconvenience to defendant, and his solvency. Where the title to property is in dispute, the injury occasioned to the parties respectively by the granting or refusing of the injunction will be compared, and the question of defendant's solvency will be considered.

Appeal from the Sixteenth Judicial District, Mono County.

The complaint was filed August 10, 1863, and avers that on the ninth day of February, 1863, the plaintiffs were the

▪ *U S. v. Parrott*, 7 M. R. 336; *Maden v. Veevers*, 5 Beav. 503.

REAL DEL MONTE M. CO. v. POND M. CO. 453

owners of, in the actual possession, and entitled to the possession of a gold and silver quartz lode, known as the Aurora Mine Ledge, commencing at a point distant fourteen feet in a direction north fifty-six degrees west from the cut in the ledge at the mouth of the shaft known as the old Aurora Shaft, and from said point of commencement extending in a westerly direction eight hundred feet on the ledge, and in an easterly direction eight hundred feet on the ledge, and that defendants on the said day and on divers days from that time until the commencement of the suit, and while plaintiffs were still the owners of and in possession of the ledge, with force and arms sunk pits and shafts upon, and excavated drifts and tunnels into the ledge, and took, removed and carried away from the ledge large quantities of gold and silver-bearing rock, etc.

An injunction was granted by the county judge the same day the complaint was filed on plaintiffs' application, without notice to defendants.

August 12, 1863, the defendants filed their answer, and thereupon moved that the injunction be dissolved. The county judge refused to dissolve the injunction, and from this order denying the motion to dissolve, defendants appeal.

KENDALL & QUINT and GOUGH & ALLEN and C. J. HILLYER,
for appellants.

MESICK and VAN VOORHIES, for respondent.

CROCKER, J., delivered the opinion of the court, NORTON, J.,
concurring.

This is an appeal from an order refusing to dissolve an injunction which had been granted upon the complaint, without notice to the defendants. The defendants filed an answer denying all the material allegations of the complaint, and moved thereon to dissolve the injunction, which was denied. The main question at issue is the ownership of the quartz ledge which the defendants are engaged in working—the plaintiffs claiming that it is a part of the "Aurora Ledge," owned by them; and the defendants denying that it is part of the "Aurora Ledge," aver that it is a part of the "Pond

Lode," owned by them, and that they are engaged in working the same as the rightful owners thereof.

The rule has been settled by this court that where a motion is made to dissolve an injunction upon complaint and answer, the injunction will be dissolved if the answer denies all the equities of the complaint, unless the complaint is supported by additional affidavits: *Gardner v. Perkins*, 9 Cal. 553; *Burnett v. Whitesides*, 13 Id. 157; *Curtis v. Sutter*, 15 Id. 263; *Johnson v. The Wide West Co.*, 22 Id. 479.

It appears that the defendants have been in possession of the quartz ledge in question for several months, have expended large sums of money in developing and working the same, and were at the time of the granting of the injunction, and had, for some time previously, been working the mine as their own. In such case it requires a very clear and strong showing to induce a court of equity to grant or sustain an injunction to stop the work. There must be an urgent necessity, and, as a general rule, the title and right of the plaintiffs should be shown to be clear, well established and not in dispute. The application should also be made promptly, and not delayed until large expenditures have been made by the defendants: *Clavering v. Clavering*, 2 Pierre Wm. 388; *Anonymous, Ambler*, 209; 18 Vesey, 515; *Norway v. Rowe*, 19 Id. 144; *Field v. Beaumont*, 1 Swanston, 203; *Hilton v. Granville*, 1 Craig & Phillips, 283.

When the title to the property is in dispute between the parties, the extent of inconvenience and expense to which the defendant would be subjected by the granting of the injunction, as compared with the injury the plaintiff would be likely to suffer if refused, often forms an important consideration in determining the right to an injunction: *Hicks v. Compton*, 18 Cal. 210; 3 Daniell's Ch. Pr. 1860; *Adams' Eq.* 357; *Bruce v. Delaware & Hudson Canal Co.*, 119 Barb. S. C. 371. The question whether the defendants are solvent, and able to respond in the damages they may cause by their acts or not, is often an important one in such cases: *Burnett v. Whitesides*, 13 Cal. 157; 2 Story's Eq. Sec. 925; *Waldron v. Marsh*, 5 Cal. 119. The plaintiffs in this case have set up no circumstances of this kind to sustain their application for the injunction.

The injunction is dissolved.

MORE V. MASSINI ET AL.

(32 California, 590. Supreme Court, 1867.)

¹ Claim for trespass assignable. A claim for damages in trespass, quarrying and taking away asphaltum, is assignable, and the assignee may sue in his own name under section 4 of the Practice Act.

Averment of insolvency, when unnecessary. When the injury goes to the destruction of the substance of the estate, which can not be specifically replaced, no allegation of insolvency is necessary to sustain an injunction.

Equitable relief and damages in the same action. A claim for damages for trespass committed and a prayer for injunction to prevent further waste may be joined in the same complaint.

Plaintiff in possession. A party may have an injunction to restrain a threatened injury to real property, in the nature of waste, even though he is in possession of the land.

The court below sustained the demurrer to the complaint, the plaintiff declined to amend, and judgment was entered against him, and he appealed.

The other facts are stated in the opinion of the court.

S. F. & J. REYNOLDS, for appellant.

CASSELY & BARNES, for respondents.

By the Court, SHAFTER, J.

The complaint is in two counts. The first count is for damages caused by a trespass upon land prior to a conveyance thereof to the plaintiff. The plaintiff claims the damages by assignment. In the second count, the plaintiff alleges that he is the owner of the lands, and that they are in his possession; that the defendants threaten to enter thereon, and to quarry and remove asphaltum therefrom, and that they will do so unless restrained. Wherefore an injunction is prayed, etc.

The complaint was demurred to on the ground that neither count stated a cause of action, and that there was a misjoinder of causes.

¹ *McGoon v. Ankeny*, 1 M. R. 9; *Williams v. Pomeroy Co.*, 6 M. R. 195.

First. The sufficiency of the first count is disputed upon the ground that the damages claimed therein are not assignable.

It is insisted that the point is covered by *Oliver v. Walsh*, 6 Cal. 456, and that after twelve years' acquiescence, the doctrine of that case ought not to be re-opened to controversy.

It is true that the question presented in the case at bar is identical with that presented in the case cited; but the grounds of judgment now are not identical with those on foot in 1856, when the case cited was decided. The decision was made under the fourth section of the Practice Act, as amended in 1855: Stat. 1855, pp. 30, 31. The original section passed in 1851 (Stat. 1851, p. 51, Sec. 4,) was as follows: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act." By the amendment of 1855, it was provided that "every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act; but in suits brought by the assignee of an account, unliquidated demand or thing in action not arising out of contract, assigned subsequently to the 1st day of July, 1854, the assignor shall not be a witness in behalf of the plaintiff." The decision in *Oliver v. Walsh* proceeded upon a construction of this amendment. It is unnecessary for us to express any opinion as to the validity of that construction, for the amendment of 1855 has been entirely superseded by subsequent legislation. There is now no distinction between persons who are competent to bring actions and persons competent to testify in them when brought. But what is perhaps more to the purpose, the legislature, by an act approved January 27, 1864, took up the fourth section of the Practice Act and re-enacted it in terms as passed in 1851, with the amendments of 1854 and 1855 left out. The question to be considered, then, is whether a claim for damages to real estate can be assigned under the fourth section of the Practice Act as it now stands.

The one hundred and eleventh section of the New York Code of 1848 was precisely the same as the fourth section of our Practice Act has been made to be by the act of 1863-4; and it was held in *McKee v. Judd*, 2 Ker. 625, that the right of action for a tortious conversion of personal property was

assignable, and that the assignee might sue therefor in his own name under the one hundred and forty-eighth section of the Code referred to. In *North v. Turner*, 9 S. & R. 248, Mr. Justice GIBSON remarked in delivering the opinion of the court, as follows: "This is an action of trespass *de bonis asportatis*, and it is urged that the property in the damages expected to be recovered, being for a mere tort, is so peculiarly attached to the person as to be inseparable from it, and that consequently before an actual recovery of the damages there was nothing for an assignment to act upon. There are undoubtedly some injuries which so peculiarly adhere to the person of him who has suffered them as to preclude an assignment of his claim to compensation for them; such, for instance, as slander, assault and battery, criminal conversation with a party's wife, and many others that might be mentioned. The right of compensation for any of these would not pass by a statute of bankruptcy or an assignment under the Insolvent Acts; nor could it be transmitted to executors or administrators. But this does not hold with respect to a trespass committed against a party's goods, the remedy for which survives to the personal representative by the statute (4 E. 3, C. 7), which clearly shows that such a cause of action is separable from the person of the owner."

By the one hundred and ninety-sixth section of our Probate Act, the right of action for trespasses committed on the real estate and in the lifetime of a person deceased, survives to his executor or administrator; and a claim for damages to personal or real estate would undoubtedly pass under an assignment by a petitioner in insolvency, of "all his property, real, personal, and mixed, for the benefit of his creditors." The survivorship in the one case, and the transfer in the other, clearly show that the cause of action in the respective cases is "separable from the person of the owner," and is therefore assignable by conclusion, according to the case cited from Pennsylvania. In *Lazard v. Wheeler*, 22 Cal. 142, though the question now under consideration was not directly presented, still it was said on the authority of *McKee v. Judd* and *North v. Turner*, that a right of action for the wrongful taking and conversion of personal property is assignable.

There can be no tenable distinction taken between tres-

passes affecting personal, and trespasses affecting real estate. Both are torts—the wrong is to property in both cases—the right of action survives in both, and under our system the argument drawn from the doctrine of champerty, which constitutes the very basis of the non-assignability of choses in action at common law, has no application to an assignment of a claim falling under either class. *Cessante ratione cessat lex.*

Second. The second count states a good cause of action. The gravamen is a threatened trespass upon land. The trespass is in the nature of waste, and it will be committed unless the defendant is restrained. Should the threat be fulfilled, the plaintiff would be deprived of a part of the substance of his inheritance, which could not be specifically replaced. In the class to which this case belongs, no allegation of insolvency is necessary. The injury is irreparable in itself: *Merced Min. Co. v. Fremont*, 7 Cal. 322; *Hicks v. Michael*, 15 Cal. 116; *Leach v. Day*, 27 Cal. 646; *People v. Morrill*, 26 Cal. 360. Inasmuch as the plaintiff's rights to the remedy by injunction has its origin in the nature of the injury complained of, it was of course unnecessary to aver matter merely adventitious: *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 551.

Third. The demurrer for misjoinder of causes is not well taken.

By the seventh subdivision of the sixty-fourth section of the Practice Act, "injuries to property may be joined in the same complaint." By the very supposal, the injuries that may be so joined are independent and distinct. The property injured may be the same or different; it may be either personal or real. The title of the plaintiff to redress may be original in respect to one injury, while in respect to the other, or others, the right may have come to him by assignment. Some of the injuries complained of may be legal, while others may be of an equitable character. Trespass upon land is a legal injury; to threaten to enter upon and waste it is an equitable injury. But both may be joined in the same complaint, nevertheless, for the statute reason that both are "injuries to property." That general likeness is the only test to which the question of joinder in cases like the present can be subjected under our system. Under the New York Code as

amended in 1852, the right to join a cause of action in equity with a cause of action at law was made to depend upon whether "both arose out of the same transaction, or transactions connected with the same subject of action." Voorhies' Code, Sec. 167. But there is no such restriction in our code. Nor do we understand that the existence of such restriction has ever been judicially determined by this court. *Gates v. Kieff*, 7 Cal. 125, was an action of trespass *quare clausum fregit*. There was a prayer for damages, and also for an injunction based on proper allegations. It is true that the land with respect to which the injunction was prayed was identical with that upon which the trespass was committed, but that was a matter upon which no stress was laid either by the counsel or the court. The appellant insisted that the complaint was radically defective for the reason that the legal and equitable causes were not distinctly stated, and that was the only question presented and determined. *Natoma W. Co. v. Clarkin*, 14 Cal. 554, was an action of ejectment. There was a prayer for an injunction to restrain the commission of waste upon the premises pending the action. The court say "that this blending of an action at law with a petition for ancillary relief to the equity side of the court is admissible under our system of practice." But the court did not determine, nor was it called upon to consider, whether the power to administer legal and equitable relief in the same action was confined to cases where the latter was merely cumulative or ancillary to the former on one continuous gist. The question was not raised. The same remark is applicable also to the decision in *Gray v. Dougherty*, 25 Cal. 266. In disposing of this appeal, however, it is not necessary to determine whether the legal and equitable relief to be granted in the same action should relate to the same subject-matter or to the same transaction. It is enough that the plaintiff herein has succeeded to all the rights and stands in the shoes of the assignor and grantor. If the assignment and conveyance had not been made, then he under whom the plaintiff claims could have sued for damages for the trespass, and counted in the same action upon an equitable injury like the one complained of herein. That was the case in *Gates v. Kieff*, 7 Cal. 124.

Fourth. It is further claimed for the appellant that the plaintiff is not entitled to the equitable relief demanded, for

the reason that the complaint shows him to be in the quiet and peaceable possession of the land.

The injury which the defendant threatens is irreparable by definition, and going as it does to the substance of the inheritance, it is a matter of indifference whether the plaintiff is in or out of possession.

Judgment reversed, and new trial granted.

THE MAMMOTH VEIN CONSOLIDATED COAL COMPANY'S APPEAL.

(54 Pennsylvania State, 183. Supreme Court, 1867.)

Dispute between lessees. In a dispute as to their rights between parties working under different leases on the same coal veins, no injunction can be granted in advance of the settlement of their rights at law, except to prevent irreparable mischief or injury.

General principles. A preliminary injunction is a restrictive or prohibitory process to compel the party to maintain his status merely until the matters in dispute shall be determined; only granted (in addition to the case of invasion of unquestioned rights) for the prevention of irreparable mischief, which can not be repaired under any standard of compensation.

¹ **Past injury.** Where defendants had run a gangway in such a direction as to cut off plaintiffs from coal which they otherwise might have taken: *Held*, a past transaction, and not to be redressed by preventive process.

² **Standing by.** It was in proof that defendants knew of the direction and extent of plaintiffs' work, which they allowed to be continued without objection; even if this fact were only doubtful it would be sufficient to defeat an injunction, for they should have been on their guard to prevent the expenditure of money on what they meant should not be realized upon by the parties expending it.

Appeal from the decree of the Court of Common Pleas of Schuylkill County, in equity, in a proceeding by bill of September, 1866, in which the St. Clair Coal Company were complainants, and The Mammoth Vein Consolidated Coal Company and William H. Sheaffer, superintendent, were defendants.

The appeal was by the defendants.

¹ *Clark v. Willett*, 4 M. R. 629.

² *Real del Monte Co. v. Pond Co.*, 7 M. R. 452.

On the 1st of February, 1862, Henry C. Carey and others executed a lease to the firm of William Milnes, Jr., & Co., in which, besides the right to mine for coal on a portion of "the Saint Clair tract," granted by agreements in 1856 and 1858, they further leased to Milnes & Co. the right to mine and take away the coal in the "Seven Foot Vein and the Big Vein, on the Saint Clair tract, to be bounded southward by a gangway commencing at"—a point described—"on a gangway driven in the Big Vein, westwardly from the new slope where the said gangway first enters the Saint Clair tract from the Lee lands, and driven at as near water level as is practicable for the sufficient drainage of the mines; first, southwardly through the upper benches of the Big Vein, and the slate overlaying the same, to and into the Seven Foot Vein; at or about"—another point described—"and thence on the Seven Foot Vein, at such courses and distances as the undulations on the strike of the vein may require the gangway to be driven. The said gangway, when driven to the western line of the Saint Clair tract, to be continued on the Ellmaker tract to and at the same level as the Seven Foot Vein gangway, now at work on the Ellmaker tract at"—a third point described—"about 220 feet west of the line of the Saint Clair tract. And the said gangway in the Seven Foot Vein, when driven through the Saint Clair tract as aforesaid, shall be the boundary line, north of which this agreement grants to the said William Milnes, Jr., & Co. the right to dig, mine and take away all the coal on the said Saint Clair tract, in the two veins before mentioned."

On the 17th of March, 1862, the same Henry C. Carey and others leased to Ell Hart for twenty years, with right to assign with the assent of the lessors, "All those parts of two veins of coal, known as the Seven Foot Vein and the Big White Ash Vein, on the Saint Clair tract of land, situate, etc., * * and from which two veins of coal Kirk & Baum were recently mining coal by the Mammoth shaft and the Mammoth slope, within the following limits, to wit, at the north-west part of the said tract of land, to the distance of sixty feet from that part of the coal in the said two veins of coal leased by the said party of the first part to William Milnes, Jr., and John Milnes, by agreement dated the 1st day of February, 1862."

On the 29th of March, 1864, Hart, with the consent of his lessors, assigned to the Saint Clair Coal Company, complainants, "the said lease for the unexpired term aforesaid, excepting and reserving therefrom and thereout the right to William Milnes, Jr., & Co., who are also lessees of a part of the Saint Clair tract, or their successors or assigns, to sink their old or eastern slope one hundred yards below the present foot of the old eastern slope aforesaid, and at the said depth of one hundred yards to run westwardly on a line parallel with the line located by R. Cleaver and G. K. Smith, July, 1858, to the Ellmaker tract, said depth being sixty-seven yards lower than agreed in the lease made to William Milnes, Jr., & Co., by the owners of the Saint Clair tract on the 1st day of February, 1862, and in consideration thereof the said William Milnes, Jr., & Co., their successors or assigns, are to pay five cents per ton on all large coal, and two and a half cents on all chestnut and pea coal taken from the said sixty-seven yards in depth, unto the Saint Clair Coal Company, in addition to such sum or sums, to be received by the owners of said tract, as may be agreed between them and the said William Milnes, Jr., & Co."

On the 16th of May, 1864, the same H. C. Carey and others executed another lease by which, in addition to rights theretofore granted to Milnes & Co., they granted "the right to sink their old or eastern slope sixty-seven yards below a point which they agreed to sink their old or eastern slope, according to the agreement of February 1, 1862; and they are to drive their gangway westwardly on that level, on the course of the vein, and are to strike the eastern line of the Saint Clair tract sixty-seven yards below their present Big White Ash Vein gangway, now on said tract; they to dig, mine and take away all the coal north of that line on that level; said gangway to be driven westwardly through said Saint Clair tract, on a line parallel with the line located by Kimber Cleaver and George K. Smith, July, 1858, to the Ellmaker tract; but they shall not and will not take away any coal south of the line above described."

Milnes & Co. transferred their leases to the defendants, who entered and commenced mining on the tract.

The bill alleges that the defendants are encroaching on the

coal veins demised to the complainants, and taking away large quantities of coal from them; that they have already taken away about 40,000 tons; that "in consequence of these encroachments and trespasses, the shaft workings of the plaintiffs can not, in future, be operated without leaving all the coal now standing between the said shaft workings on the Seven Foot Vein and the gangway of the defendants as a barrier which may prove insufficient against the water in defendants' mines, the distance being only two hundred feet from said workings to said gangway. Besides the danger from water and the probability of a crush, the direct, immediate and certain effect of these trespasses is to reduce the future productiveness of plaintiffs' colliery one half, or at least fifty cars per day.

"That the defendants are driving their said gangway to the Ellmaker tract, adjoining the Saint Clair tract, with all possible speed and despatch. The said gangway has been driven in a southwesterly direction, instead of a westerly direction, from the point of commencement, as required by their lease, on a dip of five degrees, a distance of one hundred yards, thereby encroaching upon and destroying a large and valuable portion of the demised premises of the plaintiffs, and greatly endangering the shaft workings aforesaid; that the plaintiffs, in order to keep up the productiveness of their colliery to an extent commensurate with their outlay of capital and covenants, will be obliged to sink a new slope below their present shaft. The defendants have also encroached on the Big White Ash Vein from the bottom of their eastern slope, by driving their gangway south over the line described in the transfer of lease aforesaid to the plaintiffs; * * that the damages, present and prospective, will amount to a large sum of money."

The bill prayed:

1. That the defendants may be restrained, by preliminary injunction till hearing, and perpetually thereafter, from working the Seven Foot and Mammoth Veins of coal, or portions thereof demised to the plaintiffs.

2. That defendants may be required to account for all coal taken away, and for damages done to the plaintiffs' colliery.

No answer was filed; the case was heard on affidavits.

The defendants' working was upon upper levels in the same veins as complainants'.

The witnesses for complainants stated that defendants had taken out about 40,000 tons of coal from the portions of the veins leased to complainants; that working of defendants prevented complainants working on one of their gangways, for, if they did, it would not leave pillar enough to keep the water up; that the distance between the works was 100 or 150 feet; if the workings should be stopped and water accumulate there would be danger of a crush; that there was no such danger at present; that complainants could not get coal above defendants' gangway if the defendants continued their workings; if the gangway should be driven into the Ellmaker tract it would draw the water from that and other tracts, and there would be a danger of filling complainants' mines with water; the witnesses also testified as to the workings of respondents being an encroachment in particulars detailed, and generally.

The clerk of defendants testified to paying complainants for coal taken, and of no complaint of improper working having been made. Engineers and other witnesses of defendants testified that it was impossible, on account of the formation of the veins, to drive the gangways otherwise than was done; that from the fall of 1865 to June 3, 1866, the gangways had been continuously driven, and during that time had been inspected regularly by the engineer and agent of the lessors, and that he did not give any intimation to the superintendent that he was driving in the wrong place, but had told him as to one that the defendants were the only parties that could take coal out at that point; that stopping the gangways and the workings on them in dispute would reduce the capacity of the colliery 170 tons a day, besides preventing them from getting coal from other coal tracts. It was also testified that the tunnel was driven at as near a water level as practicable for the proper drainage of the mines; that where the gangway is now driven is the only point at which it is possible to work the "Seven Foot Vein."

On the hearing, the court appointed Henry Pleasants and Stephen Harris, two mining engineers, examiners, "to examine the workings of the respondents * * for the purpose of ascertaining the course of the Mammoth Vein," etc., * * "according to the lease of May, 1864, and to report their conclusions to the court, in writing, together with any remarks they may be pleased to make upon the subject."

MAMMOTH VEIN COAL COMPANY'S APPEAL 465

The examiners made a report, with an accompanying map, which it is not necessary to detail under the views of the Supreme Court.

On the 11th of October, 1866, the court (RYON, P. J.) decreed—

“That the Mammoth Vein Consolidated Coal Company, respondents, be enjoined and restrained (until further ordered) from further driving westward the gangway on the Seven Foot Vein of coal toward the Ellmaker tract, which said gangway is south of and below the point C, mentioned in the lease dated 1st February 1862, to William Milnes, Jr., and John Milnes, as lessees, and transferred to respondents, or from mining or taking away coal mined therein, west of the point designated D, on the map, to be filed herewith; and also from driving the gangway farther east on said vein from the point designated E, on said map, or from mining or taking away coal mined therein; and also from further driving the gangway on the Mammoth Vein from the foot of the new slope (driven 200 feet, under lease of 16th May, 1864) beyond the point designated I, on said map (denoting the face of the gangway), or from mining coal therein south of the point represented on the said map by dotted lines (which said lines were made upon said map by Henry Pleasants and Stephen Harris to denote the course of the vein from the foot of the slope); and said respondents shall not take away any coal south of the line designated by said dotted lines, and shall drive their gangway according to the course indicated by said dotted lines and the report of said Pleasants and Harris, on north of said dotted lines, if practicable, so as to reach the point J, (as shown on said map), by the most direct and feasible course, on the course of the vein, from the point in the present gangway, 125 feet from the foot of the slope, according to the terms of the aforesaid lease.”

The error assigned was granting a preliminary injunction.

F. B. GOWEN and J. BANNAN, for appellants.

The positions taken by appellants were—

1. That the gangway driven toward the Ellmaker tract is not in violation of the terms of the lease of February 1, 1862.

2. That, admitting that the gangway is further south than the course prescribed by the lease, all damage which could possibly result to the plaintiffs in consequence has been already sustained, and there is no such future or continuing injury to be apprehended as would justify a court in awarding a preliminary injunction.

3. That the plaintiffs have no right to a decree enjoining the defendants from mining upon lands to which the plaintiffs have neither title nor claim of title.

4. That the plaintiffs have an adequate remedy at law for all injuries sustained by them, and that their bill in equity can not be maintained against the defendants, who are in possession under claim of title; and cited *Lowndes v. Bettie*, 4 Am. Law. Reg. 169.

B. W. CUMMING, for appellees.

The only lawful possession the appellants had was of those portions within their proper boundaries. What constitutes possession is a question of great importance: *Mitchell v. Dors*, 6 Ves. 147. Where a trespasser works a mine to the injury of the owner an injunction will be granted: 2 Story's Eq. § 929; *Brown v. Weir*, 5 S. & R. 402; *Denny v. Brunson*, 5 Casey, 382; *Scheetz's Appeal*, 11 Id. 95. In this case the right can be ascertained.

The opinion of the court was delivered, February 14, 1867, by THOMPSON J.

We have examined the affidavits and other proofs exhibited, pro and con, by the parties on the hearing of the motion for a preliminary injunction in this case, and the order or decree made in granting it. We can not but regard the decree as much more in the nature of a final than a preliminary decree, for it not only enjoins, but directs what the defendants shall do. Indeed, the contest before the court seems to have left out of sight the true nature and object of the writ of injunction applied for, and became involved in questions about the rights of the parties under the terms of their respective leases. If these were in dispute, it is obvious

no injunction could be granted until questions respecting those rights were settled at law or in equity. It ought not to be forgotten that a preliminary injunction is a restrictive or prohibitory process, designed to compel the party against whom it is granted to maintain his status merely until the matters in dispute shall, by due process of the courts, be determined; the sole foundation for such an order being, in addition to cases of the invasion of unquestioned rights, the prevention of irreparable mischief or injury. As a preliminary injunction is in its operation somewhat like judgment and execution before trial, it is only to be resorted to from a pressing necessity to avoid injurious consequences which can not be repaired under any standard of compensation. It is therefore a preventive remedy only. The number of tons of coal which it was alleged by the plaintiff the defendants had mined and taken and claimed, was a past transaction, and could not be touched by a preliminary injunction. So also, if the direction of the defendants' gangway did cut off coal from the plaintiffs, which, but for it, they might have taken out, this, like the other cause of complaint, was also a past transaction, and not to be redressed by preventive process.

Nor do we think the peril from water, if the defendants should proceed into the Ellmaker tract with their gangway, was shown to be so imminent as to require the stoppage of the defendants in their progress toward that point. At most it was speculative; contingent on the defendants ceasing to operate under their lease. But it was not shown that they meditated or threatened this. Had it been made manifest that the consequence of the defendants' operations would have the effect of letting the water in large quantities into the plaintiffs' mine, it would assuredly have been proper to have enjoined them from proceeding, even although they were operating exactly within the terms of their lease. But that did not appear. Protection against the contingency which the plaintiffs seem to have feared, namely, the drowning out of their works by the cessation of the defendants to mine, can no doubt be guarded against on final hearing, if it exist, when all the facts in exact form will be before the court; but threatened irreparable mischief from this cause was not shown to exist or reasonably to be apprehended, so as to justify the granting of the preliminary

injunction. Indeed, the defendants gave a great preponderance of proof to show that the plaintiffs all the while knew of their operations, the direction and extent of their work, and made no objection. Even if the matter of fact had been so balanced in the proof as to have left it in doubt, this would have been sufficient to have prevented the granting of an injunction, for the plaintiffs should have made known their objections and put the defendants on their guard against expending their money on what they meant should not be realized by them. It may be that on final hearing grounds for intervening as prayed, may be made manifest; but about this we express no opinion. We only say that the case when heard did not present such an aspect as required the highest exercise of the chancellor's power to restrain the defendants.

The statute under which this appeal was taken is an experiment in this State, and will assuredly be fraught with bad and annoying consequences, in the increase of expenses in proceedings in equity, incident to double hearings and arguments in the courts below, and in this court, in all preliminary decrees for injunctions, unless the courts are careful to grant them only where it clearly appears that the purposes of such writs are plainly proper, viz., to prevent irreparable mischief. That was not the case in our opinion in this instance, and we must therefore reverse the decree.

And now, to wit, February 14, 1867, the order and decree of the 11th of October, 1866, entered in the court below at the instance of the plaintiffs against the defendants in this case, is reversed, annulled and set aside, together with the writ issued in pursuance thereof, at the cost of the appellees.

Reversed.

MUNSON ET AL. V. TRYON ET AL.

(6 Philadelphia, 395. Supreme Court of Pennsylvania, 1867, at *Nisi Prius*.)

Injunction when title disputed. A destructive trespass will be restrained by injunction, although an adverse title be asserted by the party committing the trespass.

¹**Jurisdiction beyond county.** A court of equity, having the parties within its jurisdiction, may restrain by injunction a trespass upon lands lying in another county.

Ejectment. A party in possession ought not to be compelled to bring ejectment.

²**Incidental grounds for injunction.** Collusion with tenant, abuse of process and purchase of unwarranted title for small consideration, considered incidentally, upon application for injunction.

Motion for a special injunction.

STRONG, J.

The case as exhibited by the bill, answer, affidavits and exhibits, is this: The complainants claim to be the owners of six contiguous tracts of land situated in Schuylkill county. These tracts are coal lands, and prior to the year 1853 they were almost entirely, if not entirely, uncultivated. In that year the plaintiffs, having previously acquired a title thereto, demised the entire body, together with other tracts, unto one Jacob Kohler, that he should hold the same as their tenant for two years, he yielding and paying a rent to be measured by the quantity of coal that might be mined, dug or sold and carried away. The lessee bound himself not to suffer any coal to be dug, mined or sold and carried away from the premises during the term by any other person or persons except for him and under his directions, and bound himself that he would protect the land against any trespasser; that he would use and occupy a stone dwelling house on the lands, previously erected by the plaintiffs, and that he would clear and make fit for tillage one acre of land near the said dwelling house each year during the term. In pursuance of this lease Jacob Kohler went into possession of the lands in 1853. He occupied the dwelling house, and either he or his sub-tenants, or other tenants of the plaintiffs, have occupied it ever since. In the

¹ See *West. Union Tel. Co. v. West. & Atlantic R. R.*, 8 Baxt. 54 (Tenn.).

² *Lyon v. Woodman*, 7 M. R. 494.

fall of 1864 the plaintiffs caused to be erected a frame dwelling house upon each of the six tracts, except the one on which the stone house stands, and they demised all the tracts to tenants who then entered and who have been in possession by actual residence ever since. The possession of the six tracts has thus been in the plaintiffs by their tenants from the year 1853, uninterrupted, except so far as the acts of the defendants disturbed it in 1865. No considerable part of the lands has been cleared, however; near the stone house about twenty-six acres are under cultivation, and about an acre or very little more around each of the frame dwellings. But from 1853 to the present time, all the tracts have been assessed to the plaintiffs as seated, and they have regularly paid the taxes without, so far as it appears, any adverse claim of right to the lands until the month of April, 1865.

About that time some of the defendants, claiming to be lessees of George K. Tryon, another defendant, began to make surveys upon the lands, and threatened to sink shafts to the coal measures, and open mines thereon, erecting breakers and taking away coal. By the lease which they took from Mr. Tryon, they bound themselves to build houses upon the land, not less than six in one hundred days, one house on each of the six tracts of land, and to put tenants in them, subject to the approval of their lessor. They were authorized by the lease, so far as it could authorize them, to cut timber on the land for house building and for mining props, and the lease even contemplates that they may exhaust the whole timber. It also authorizes them to construct railroads on the property, to dig and mine stone coal on all the tracts, either above or below the water level, and it binds the lessees to mine, raise and send to market not less than two hundred and forty thousand tons each year, during the twenty years for which the demise was made.

I am now moved to enjoin the defendants against these acts thus threatened. The plaintiffs insist that they are entitled to protection in their possession by their tenants; that the acts complained of are trespasses in the nature of waste; that they have no other adequate remedy than an injunction, and that a court of equity will interfere to prevent such acts as are threatened until a party attempting thus to enter by force and

commit acts which would be waste if done by one in privity of estate with them, shall vindicate his right thus to act by action at law.

Before proceeding to consider the question whether such a cause is presented as justifies my interference by injunction, I have to dispose of an objection to the jurisdiction of the court. The defendants urge that the Supreme Court sitting in Philadelphia has no rightful jurisdiction of the parties defendant. It is said Oliver, Fegely, Lomison and Hoff are residents of Schuylkill county, and that the subpoena was served upon them there. If the fact be as asserted, I do not perceive that it is any objection to my taking cognizance of the bill. All the acts complained of were done or threatened at the instigation of George K. Tryon, and he is a resident of Philadelphia, and he was served with process here. In my opinion, he is a principal defendant, and therefore, under the act of 1859, P. L. 387, Sec. 19, a subpoena was rightfully sent for service on the other defendants in Schuylkill county. But if it were not so, they have appeared and put in answers to the bill without making any objection to the service. It is then no longer in their power to object that I have not jurisdiction over the parties. In addition to this, all the defendants now residents in Philadelphia upon whom service was made elsewhere, have organized themselves into a corporation, and that corporation has been made a party. Over it, it can not be doubted this court has jurisdiction, at least for some purposes. Whether that is enough to justify my interference in a matter not relating to the internal policy of the corporation at the suit of one claiming adversely, I do not care now to determine, for it is sufficient that all the defendants have submitted to the jurisdiction of the court.

It is argued, however, that even if there is jurisdiction over the parties, there is none of the cause. I am moved to enjoin against the commission of acts in the nature of waste upon lands outside of this county. But if I have jurisdiction of the persons of the defendants, it can not matter that the lands are located in another county. My order or decree affects the defendants personally. It is only indirectly and through the defendants that it affects the lands. It has often been decided that when a chancellor obtains jurisdiction over

a party, he may make a decree that affects lands even in a foreign country. He may enforce trusts or conveyances, or enjoin against foreclosure of mortgages: Story's Eq. Jnr. Ch. 18, Sec. 743-4; *Massie v. Watts*, 6 Cranch, 148; *Beckford v. Kemble*, 1 Sim. & Stuart. It is true that to justify the court in interfering and exercising a jurisdiction in cases relating to lands where the court can not send its process, the relief sought must be such as the court is capable of administering in the case before it. For this reason it was ruled by Judge King, in the Court of Common Pleas of Philadelphia, that the court had no jurisdiction of a bill complaining that the defendant had set up and maintained a nuisance affecting plaintiff's land in Montgomery county. The reason assigned for this ruling was, that no obedience of the defendant or act of his could execute the necessary decree. The wrong done was the creation of a nuisance. The only remedy was abatement, and the common pleas could not send process to abate the nuisance. The case does not decide that a court of equity is powerless to restrain a threatened injury to lands outside of its jurisdiction by parties within its control and subject to its process. But jurisdiction is entertained in equity over extra-territorial torts, when the court has full power to execute its decree, where the appropriate decree operates upon the future conduct of the defendant and not directly upon the property threatened to be injured. When a nuisance has been set up and abatement is decreed, in order to carry the decree into effect, a writ of assistance or other similar process may be necessary. Such a writ can not be sent into a foreign jurisdiction, and, therefore, in such a case, because a court of equity can not complete its work, it will not commence. But the case I have before me is no such case. There is no nuisance to be abated. Nothing is to be undone. The bill seeks only to prevent a future wrong. All that is needed or asked is to reach the conscience of the defendants. For this reason I think that, having jurisdiction over the persons of the defendants, I have also jurisdiction of the cause.

I come then to the main question in the case. The acts threatened by the defendants, if done by strangers to the ownership of the land, would be trespasses of no common enormity. They are cutting the timber (which, in order to carry

out the other purposes avowed, may be carried to the extent of entirely denuding the lands), building railways, opening mines and taking away immense quantities of coal. That such acts would amount to waste, if done by persons holding under the plaintiffs, or in privity with them, is indubitable. They would be waste of the most flagrant character, which a chancellor would hasten to prevent. When done by persons not in privity of title with the plaintiffs, they are technically not waste, but trespasses in the nature of waste. They tend to the permanent injury or destruction of the lands.

Without attempting to review the reported cases upon the subject, I think it can not be denied there has been an increasing tendency in courts of equity for many years to disregard the technical distinction between waste and trespasses in the nature of waste, and to interpose by injunction against the latter, as well as the former, whenever such interference is necessary to prevent permanent injury. Injunctions against such trespasses have become a common exercise of a chancellor's power. It is true they are not often granted against a defendant in possession, at the suit of persons claiming title, though out of actual possession, yet they are not always denied. Two reasons may be assigned for this. There is always a *prima facies* of right in a person having possession, and the person out of possession and claiming adversely may bring ejectment, and, with us at least, sue out a writ of estrepement, thus protecting the property from spoliation. But when the defendant is out of possession, and enters or threatens to enter upon lands in the possession of the plaintiff, and to commit acts in the nature of waste, like cutting timber, opening mines, or carrying away coal or minerals, parcel of the estate, equity is more ready to interfere.

The difficulty in this case is that I am asked to enjoin against parties out of possession indeed, but claiming title to the lands adversely to the complainants. It is insisted that an injunction will never be granted where the plaintiff's title to the land, upon which the injury is done or threatened, is denied, and where the defendant sets up an adverse title in himself. I think, however, this assertion is too broad, and that in all its extent it is not sustained by the decisions. I agree that when a defendant acts or proposes to act under an

assertion of right, it must be a peculiar case which will justify an injunction against his doing that which, if he be the real owner, would be the legitimate exercise of a right. But the authorities do convince me that in such a case a court of equity will interfere even against one who claims title, and that it is not in every case an insuperable bar that the right of a plaintiff in possession is disputed. The earliest case that has fallen under my notice is one cited in *Mogg v. Mogg*, 2 Dickens. 670, as having been decided by Lord CAMDEN. There a lord of a manor filed his bill to stay waste against defendants, who claimed a right to estovers, and under that right cut down timber in one day to the value of £400. Lord CAMDEN granted the injunction. The defendants desisted, but their attorney advised other tenants of the manor to cut timber, whereupon Lord CAMDEN granted an injunction to stay waste against persons not parties. In remarking upon this case Lord THURLOW said there was a right to something in the defendants, though, perhaps, they carried it beyond what such right went to, and that until such right was determined, it was very proper to stay them from doing an act which, if it turned out they had no right to do, would be irreparable. It is impossible to examine the case without noticing that an injunction was granted against defendants' claiming a right to do what they were enjoined against. The chancellor did not undertake to decide that they had transgressed their right and acted beyond it, that is, without right. It was sufficient that perhaps they had done so, and the injury was irreparable. Moreover, even if the original defendants had gone beyond the right they claimed, an injunction was also granted against others not original parties, though there is nothing to show that they abused the right claimed. I shall not go over all the cases. The principal ones are *Robinson v. Lord Byron*, 1 Brown's Cas., c. 587; *Grey v. The Duke of Northumberland*, 13 Ves. 236; *Kinder v. Jones*, 17 Ves. 110; *Thomas v. Oakley*, 18 Ves. 184, and *Loundes v. Bettie*, 10 Jurist., N. S., 226.

So also, in *Haigh v. Jagger*, 2 Coll. Ch. c. 231, Vice Chancellor Knight BRUCE, (in commenting upon *Smith v. Collyer*, 8 Ves. 89, in which case Lord Eldon had refused an injunction sought by infants in possession, by their guardians, against a defendant claiming as heir), remarked that he was

not satisfied that under the same circumstances the court would not now (in 1845), have granted an injunction. All these cases are reviewed in *Loundes v. Bettie*, by Vice Chancellor KINDERSLY, and in view of them and many others, one of the conclusions to which he comes is that when a plaintiff is in possession, and the acts complained of are committed by a person claiming under title adverse to that of the plaintiff, the tendency of courts of equity is now to grant the injunction, unless there are special reasons why it should not be done. I can not say that I am prepared to assent to all the conclusions reached in *Loundes v. Bettie*, or even to the one I have mentioned to its fullest extent. But I do think there is an increasing disposition in courts of equity to prevent waste or partial destruction of property by persons out of possession, even though done or threatened under an assertion of title. And why should there not be? The law can give no adequate remedy. The action of a chancellor is prompt. The process of the law is slow. Acts of a defendant may work entire destruction, and the law can at most but enforce compensation. It can not replace the property destroyed. Shall it be permitted that property, the title to which is in dispute, may be destroyed either wholly or partially by one who possibly has no right? If he be out of possession ought he not to be required to vindicate his right before he shall ruin the subject of controversy? He has power to restrain the person in possession until the right is determined. This he can do by ejectment and estrepement. Are the rights of the person in possession against him any less than his right against that person, so far as relates to the preservation of the property from irreparable injury?

I think then, by the cases cited, as well as by the language of judges in several other cases, I am justified in asserting at least so much as this, that a defendant does not of course paralyze the arm of a chancellor when he asserts that the acts complained of as done by him, are done under a claim of right or title in himself. If he is out of possession he may be enjoined though he claims adversely to the plaintiff. Let it be that the circumstances must be peculiar. The right to judge of those circumstances, and to interfere if necessary for the preservation of the property, is in courts of equity. What

the peculiar circumstances must be, it is of course impossible to define. They will differ in each case. Doubt in the mind of the judge whether a defendant is not transgressing the right claimed by him, seems to be one. Attempting collusions with the tenants of the plaintiff is another. Inability on the part of the plaintiff to resort to law is another. Whatever will satisfy a court that the threatened mischief ought to be prevented until the title be ascertained, warrants interference to prevent destruction of the subject of dispute until the controversy be determined.

This brings me to consider the circumstances of the present case. I have already noticed that the plaintiffs went into actual possession of the lands in 1853. They took possession under a claim of right at that time undisputed. Their possession was actual as distinguished from that which is merely constructive. Their leases to their tenants described the lands by old and defined boundaries. I say their possession was actual. True, there was cultivation or inclosure only to a small extent, but there was residence, with a claim of right to the whole, and payment of taxes for the whole, continuous for a period of at least fourteen years. It can not be doubted that had this possession continued for a period of twenty-one years uninterrupted, it would have ripened into a complete title under the Statute of Limitations. In addition to this the plaintiffs, in October or November, 1864, erected small dwelling houses upon each of the six tracts, and put tenants into them, each to hold possession of the entire tract upon which his dwelling house was located.

Now, while I do not intend to enter at all into the consideration of the plaintiffs' title, or that under which the defendants claim, I think it can not be doubted that there is a *prima facies* of right in the plaintiffs. They are in a better condition than the defendants in this particular, at least, that they are in possession, and that no attempt was made to disturb their possession until shortly before this bill was filed, in the spring of 1865.

If now I look at the right claimed by the defendants, I find it a title not asserted from the year 1797 down until 1865. In 1863 it was bought for a sum of money bearing no considerable proportion to the acknowledged value of the land.

The purchaser took a deed, expressly excluding all warranty of title. He then conveyed to George K. Tryon, who demised to the defendants, Lomison, Oliver, Hoff and Fegely, "to the extent of the lessor's right and interest," stipulating against any covenant for quiet enjoyment. It is under this lease that the acts of waste, or trespass in the nature of waste, are threatened to be done.

While I express no opinion respecting the validity of this title, while it may prove good notwithstanding the small price paid for it, I can not close my eyes to the facts that its assertion has been long delayed, and that it is not put forward with confidence. There are evidences of distrust, both in the deed from Emily Hollingsworth in 1863, and in the leases to Lomison, Oliver, Hoff and Fegely in 1865. Those who claim under it ought not, in my judgment, to be permitted to do acts upon the property which the law recognizes as waste or injury to the inheritance, until they have maintained their right at law.

It is also an important consideration with me that there is no difficulty in the way of the defendants bringing an action at law and testing the value of their asserted title. They are out of possession. They can bring ejectment, and during its pendency prevent any acts of waste or destruction being done by these plaintiffs or the tenants holding under them. On the other hand the plaintiffs can bring neither ejectment nor trespass, for the lands are demised to tenants. Even if they could bring ejectment, it would be at the cost of confessing themselves out of a possession they have maintained unchallenged for twelve years, and could they maintain trespass it would be an inadequate remedy. It would not protect the property from that which the law treats as an irreparable injury, and it might not even determine the title.

I attach also some importance to the conduct of some of the defendants, or rather the means adopted by them to carry out their plans. There is considerable evidence of attempted tampering with the tenants of the plaintiffs, to induce them to refrain from that resistance to the acts of the defendants which duty to their landlords required them to make, and there is also evidence that the defendants made a fraudulent use of criminal process against the tenants, in order that sur-

veys of the lands might uninterruptedly be made, preparatory to the acts of trespass or waste threatened. These are circumstances of the case which I ought not to overlook.

In view of all these considerations I think a case is presented that justifies and demands my interference by injunction.

Let an injunction be prepared in accordance with the prayer of the bill, to continue until the defendants shall maintain their alleged rights to the property by action at law, or until further order.

LADY BRYAN GOLD AND SILVER MINING COMPANY V.
LADY BRYAN MINING COMPANY ET AL.

(4 Nevada, 414. Supreme Court, 1868.)

¹ **Effect of answer.** There are exceptions to the rule that the court will not decree an injunction where the material averments of the bill are traversed by the answer; but no special reason for exception appears in this case.

Notice required by statute. An order refusing an injunction will not be disturbed on appeal if the record fails to show a notice of the application or an order to show cause as required by statute.

² **Showing necessary on appeal.** To entitle an appellant to a reversal of an order or judgment of a lower court he must make such an affirmative showing as will negative at least the probability of the correctness of such order or judgment, for the presumption is in favor of its regularity.

Practice as to restraining order. The notice required by statute of an application for injunction does not apply to the case of a temporary restraining order, nor is an appeal authorized from an order granting or refusing the latter.

Appeal from the District Court of the First Judicial District, Storey County.

QUINT & HARDY, for appellant.

MESICK & SEELY, for respondents.

By the Court, LEWIS, C. J.

¹ *U. S. v. Parrott*, 7 M. R. 336.

² *New Boston Co. v. Pottsville Co.*, 5 M. R. 118.

LADY BRYAN M. Co. v. LADY BRYAN M. Co. 479

This is an appeal from an order refusing an injunction. The record presented to us is made up of the summons, complaint, answer, order denying the injunction, and the notice of appeal, and upon it only one question is submitted for determination, that is, whether the court below erred in refusing the injunction upon the bill and answer. We conclude unhesitatingly that it did not. The complaint probably makes out a case entitling the plaintiff to the issuance of the writ, but all its material allegations are denied by the sworn answer of the defendants. Such being the case the writ was properly refused, for, as a general rule, it is not granted upon a pleading alone, whose material averments are denied by the pleading of the opposite party: *Hill. Inj.*, Sec. 37; *Gardner v. Perkins*, 9 Cal. 553. There are exceptions to this rule, it is true, but no special reason is given or appears why an exception should be made in this case.

There is also another reason why this order appealed from should not be reversed. Section 6, Stat. 1864, 75, declares that no injunction shall be granted unless after notice, or after an order to show cause. The record in this case does not show that this requirement of the law was complied with by the appellant, nor does it appear that it was not because of a failure in that respect that the writ was refused. If the notice was not given, and no order to show cause had been made, the court could not properly have granted the relief sought. As it is not shown that either was done, the order denying the injunction can not be disturbed, for it may have been upon that ground alone that it was refused. To entitle himself to a reversal of an order or judgment of a lower court, the appellant must always make such an affirmative showing in the appellate court as will negative at least the probability of the correctness of such order or judgment, for that presumption is in favor of its regularity.

The section of the act already referred to authorizes the issuance of what is called a temporary restraining order, to continue during the pendency of the application for the injunction, without previous notice, or an order to show cause, but it is only from the order refusing or granting the latter that an appeal seems to be authorized. Such is the character of the order appealed from in this case; hence the notice or

order to show cause should necessarily have preceded the granting of the writ.

The order must be affirmed.

WHITMAN, J., did not participate in the foregoing decision.

THE SCHUYLKILL AND DAUPHIN IMPROVEMENT AND
RAILROAD COMPANY V. SCHMOELE ET AL.

(57 Pennsylvania State, 271. Supreme Court, 1868.)

¹ **Lessees enjoined and still held to their covenants.** The lessees of a coal mine, under covenants to pay royalty in installments, in advance, upon 120,000 tons of coal, whether raised or not, to do dead work, etc., with a right of entry for breach, were enjoined from work under writ of estrepement, at the suit of a third party. The lessors then gave notice of forfeiture for breach of covenants. The lessees prayed an injunction, alleging the estrepement against them as an excuse for non-payment of rent, etc., but the court held that they were still liable under their lease; that the writ of estrepement did not work an eviction, and refused the prayer of the bill.

Lease implies covenant for quiet enjoyment, but not against tortfeasors. Every lease implies a covenant for quiet enjoyment. But it extends only to possession, and its breach arises only from eviction by means of title. It does not protect against entry and ouster by a tortfeasor; nor even against the assertion of the right of eminent domain.

Idem—An action of ejectment followed by a writ of estrepement is no breach of the covenant; and this result is not produced until it reaches actual or virtual eviction.

This was a bill in equity, filed by William Schmoele and Henry Schmoele against The Schuylkill and Dauphin Improvement and Railroad Company.

The bill charges that the plaintiffs, by lease of February 2, 1864, rented from the defendants, for fifteen years, with privilege to the lessors to renew for ten years, the exclusive right of mining coal on a tract of land in Schuylkill county, to cut timber for improvements which were to be erected at the lessee's expense, the rent to commence October 1, 1864, at which time the lessees' improvements were to be completed;

¹ See *Tiley v. Moyers*, 4 M. R. 320; *Walker v. Tucker*, 70 Ill. 527; *Post LEASE*; *Shaw v. Stenton*, 2 H. & H. 858; *Post LEASE*.

they agreed to mine at least 80,000 tons of coal from the Mammoth vein, and 40,000 tons from the Bear Gap vein; they were to pay rent at a rate per ton specified in the lease, and they were to pay in advance for 120,000 tons of coal, whether raised or not; that if the veins should prove so faulty as that the lessees could not take out the full quantity, they should be released to the extent of the faults, provided they should drive a sufficient number of gangways, etc., and if the rent should be in arrears at any time for two months, the lessors might make distress, etc.; for breach by the lessees of any of their covenants the lease should be forfeited, and the lessors might re-enter.

The bill avers the making of extensive improvements by the lessees; that the Philadelphia and Reading Railroad Company agreed to make a branch road to the mines; that they afterward declined to do so, because one Munson had informed them that he claimed a large portion of the land leased to the plaintiffs, and they were thus prevented from transporting large amounts of coal, etc.; that in October, 1864, Munson and others instituted an action of ejectment for a large part of the premises leased, and on the 17th of October issued a writ of estrepement, preventing the lessees from cutting timber, driving a tunnel, etc.; that the ejectment was still pending, and the estrepement prevented them from going on with their improvements, etc., still in force; that on the 27th of October, 1865, the defendants notified the plaintiffs that they had failed to pay the rent and had otherwise broken their covenants, and that it was the intention of the defendants to re-enter, unless the plaintiffs should remove the cause of forfeiture in thirty days; and after setting out other matters, and that they were prevented from carrying on their operations by the writ of estrepement, so as to comply with the requisitions of the lease, and averring that if allowed a reasonable time, and the prohibition to driving their tunnel should be removed, they would be able to mine the amount of coal stipulated for, etc.; they prayed that the defendants might be restrained from exacting a forfeiture of the lease, from re-entering the premises, and from distraining; the injunction to continue till the estrepement be withdrawn, etc., and for general relief.

A number of affidavits were filed in support of the bill, and one affidavit on the part of defendants.

A special injunction was granted, and the defendants appealed, assigning for error the granting of the special injunction.

N. H. SHARPLESS and W. L. HIRST, for appellants.

C. E. LEX, for appellees.

The opinion of the court was delivered, February 27, 1868, by AGNEW, J.

Every lease implies a covenant for quiet enjoyment, but it extends only to the possession, and its breach, like that of the warranty for title, arises only from eviction by means of title. It does not protect against the entry and ouster of a tort-feasor. Even the entry of the State, by virtue of her right of eminent domain, incurs no breach of the covenant: *Maule v. Ashmead*, 8 Harris, 483; *Ross v. Dysart*, 9 Casey, 452; *Frost v. Earnest*, 4 Wharton, 90; *Dobbins v. Brown*, 2 Jones, 75. This being the law of the relation between landlord and tenant, it is difficult to perceive how an ejectment, even when followed by a writ of estrepement, can be deemed a breach of the covenant. The rights of a landlord would be almost worthless if every time a pretender to title may bring an ejectment against his tenant and issue an estrepement to stay alleged waste he would find his rent suspended, and his remedies gone until the ejectment should be ended. But an action can not produce this result, until it has its point in actual or virtual eviction. The tenant has a right to call his landlord into his defense, and if eviction follows, as the result of a failure to defend him, he can then refuse payment of the rent and fall back upon his covenant for quiet enjoyment to recover his damages. Under the lease between these parties the plaintiffs were bound to pay the rent at the stipulated rate per ton for 120,000 tons per annum, whether they mined the coal or not. The plaintiffs were allowed until the 1st day of October, 1864, to fit up the premises and make the improvements necessary to prepare for mining before the rent should commence running. After this time they were bound to pay the rent according to the minimum number of tons fixed. Tho

sum thus stipulated they were bound to pay at all events, and nothing less than an eviction or a discharge would suspend or release. The clause for forfeiture and re-entry for non-payment of rent could be made effective only by their own default. But it is said to be a great hardship to be prevented from mining by the estrepement, and yet forced to pay the rent. This is so, but it is their misfortune, not that of the lessors. If the ejectment prove to be well founded they have their remedy on their covenant for quiet enjoyment, and if unfounded why should the lessors suffer? If any remedy lies against the plaintiff in the ejectment for his false plaint, certainly it does not belong to the lessors. This is the whole case of the plaintiffs in this bill as it appears at present, and it affords no ground for a special injunction.

The decree made at Nisi Prius, awarding a special injunction, is therefore reversed, and the special injunction dissolved.

Reversed.

SHERMAN V. CLARK.

(4 Nevada, 133. Supreme Court, 1868.)

Requisites preliminary to injunction. No injunction ought to be allowed where the remedy is complete at law; it is granted only to prevent injury (although an account for past injury may be incident), and there must be a reasonable probability that a real injury will occur unless the writ be granted.

¹**Usurpation of office, etc.** The right to an office in a company can not be tried on application for injunction, nor can it restore an officer to his position, nor can it remedy the removal of a company officer after the removal has been already made.

Injunction to restrain transfer of stock illegally issued by a secretary of the company may issue, but only on a proper showing of the illegality of the issue and of the proposed transfer.

Misuse of company funds. Charging the superintendent with depositing the company funds with a mercantile house instead of in a bank, and with refusal to pay claims against the company, can not be considered breaches of duty when unaccompanied by special allegations showing it to be his duty to do otherwise.

Agent applying for patent. Though there may be circumstances where an application for patent would not be advantageous to a company, the mere allegation of such fact is not sufficient.

¹ *Gilroy's App.*, 100 Pa. St. 5.

¹**Superintendent working without orders.** If a superintendent be working without any control of the president or board of trustees, it does not follow that the mine is being worked injuriously to the stockholders. **Threatening to continue.** Where the acts complained of do not make a case, it follows that a threat to continue them can not aid the matter.

Appeal from the District Court of the Sixth Judicial District, Lander County.

This was a suit for an injunction.
The facts are stated in the opinion.

D. COOPER, for appellant.

GEO. S. HUPP and UREN and CROYLAND, for respondent.

By the Court, LEWIS, J.

The facility with which injunctions have been obtained from the courts in this State seems to have made the application for them almost a matter of course in every conceivable character of case.

When the law appears to afford no specific remedy for some petty annoyance or imaginary wrong, this writ is applied for as if it were the great sovereign and infallible remedy—the legal panacea for every ill that may arise in the complicated affairs of man. But unfortunately, perhaps, the writ of injunction does not possess these marvelous virtues and limitless powers. Its office is limited, and it is generally employed only as an auxiliary remedy.

In disposing of this case, we have not found it necessary to look into the evidence or proceedings of the court below, because, in our opinion, the bill makes no showing entitling the plaintiff to the relief sought by him. Such being the case, the judgment denying the injunction was correct, and can not be reversed by this court, for no person is in a position to complain of error who does not show by his pleading that he has some cause of action or ground of defense.

¹ Such a *dictum* as this can only be justified by the fact that neither the corporation itself nor the body of stockholders seem to have been complaining parties: *Flagstaff Co. v. I atrick*, 4 M. R. 19.

Before specially discussing the sufficiency of the plaintiff's bill in this case, it may be well to state some of the general and fundamental rules governing the issuance of the writ of injunction, and which have a bearing upon this case. The writ is exclusively an equitable remedy. But equity is chary of its powers; it employs them only when the impotent or tardy process of the law does not afford that complete and perfect remedy or protection which the individual may be justly entitled to. When, therefore, it is shown that there is a complete and adequate remedy at law, equity will afford no assistance. "When a party has a remedy at law," says Mr. Hilliard, "he can not come into equity, unless from circumstances not within his control he could not avail himself of his legal remedy." Hill. Inj. Sec. 23. "That full compensation can be had at law is the great rule for withholding the strong arm of the chancellor," says Mr. Justice Thompson, in *Pusey v. Wright*, 31 Penn. 387. See, also, *Thompson v. Matthews*, 2 Edw. Ch. R. 213; 9 Paige, 323. Before refusing its aid upon this ground, however, it must appear that the legal remedy is complete and adequate to afford the complainant full redress; but when that fact does appear, equity at once relinquishes all control over the case, and leaves the party to pursue his legal remedy.

Another rule having an important bearing upon this case is, that an injunction is only issued to prevent apprehended injury or mischief, and affords no redress for wrongs already committed: Practice Act, Sec. 112. "Injunction," says the learned author already quoted, "is said to be wholly a preventive remedy. If the injury be already done, the writ can have no operation, for it can not be applied correctively so as to remove it. It is not used for the purpose of punishment, or to compel persons to do right, but simply to prevent them from doing wrong": Hill. Inj., Sec. 5. See, also, *Watson v. Hunter*, 5 John. Ch. R. 169. A remedy for an injury already committed will sometimes be given as incident to the injunction, as in *Garth v. Cotton*, 1 Ves. 528. A decree for an account of the waste already committed was granted as an incident to the injunction to stay future waste. But it is only in cases where a sufficient showing for an injunction is made out, and an injury has already resulted from the act enjoined, that such a remedy will be afforded.

It must also be made to appear that there is at least a reasonable probability that a real injury will occur if the injunction be not granted. This extraordinary writ should not be issued upon the bare possibility of injury, or upon any unsubstantial or unreasonable apprehension of it. The injury, too, must be real, and not merely theoretical. If the propositions or rules thus stated be correct, it is clear that the plaintiff's bill is utterly insufficient to entitle him to the relief prayed for. The several specific causes of complaint which it contains will be noticed in the order in which they are presented in the bill. After stating that he is a stockholder in the Magnolia Gold and Silver M. Co., the plaintiff alleges that "The defendant is now, and for a long period of time has been, the acting superintendent of such Magnolia G. and S. M. Co., and is now, and has been for a long time, acting as trustee, secretary and treasurer of said company; that by law the said Magnolia G. and S. M. Co. is entitled to three trustees, and it is provided by law that the business of said corporation should be managed and conducted, and the mine of said corporation worked, under the supervision and control of said board of trustees. That the office of one of said trustees has been declared vacant, and that one J. W. Brown is a trustee and president of said corporation, and that there are no trustees of said corporation but said Brown and the defendant herein." And thus plaintiff alleges the defendant "has attempted to remove his co-trustee and the president of the said company, and has published notices in the public press to that effect, and has seized the books and all the property of the said company, and retains possession of them, and refuses to give them up to the said president and trustee aforesaid, and prevents him from participating in the control or management thereof, and has ousted and ejected him from his said offices as president and trustee, and refuses to permit him to discharge any of the duties of the said offices."

This allegation begins by charging that the defendant had attempted to remove Brown from his office. He seems, however, to have been rapid in his maneuvers, for we find at its close that Brown is removed and no longer occupies his position. To be removed from his office was, perhaps, an injury of which Brown might justly complain, and the

law, upon a proper showing by himself, would doubtless restore him; but that it is a ground for an injunction is by no means so clear. It is not claimed that the defendant is himself acting as president. His moderate ambition contents itself with four positions in the corporation, and exhibits no desire to fill the fifth. But if it were shown that he was discharging the duties of president of the corporation, that of itself would not authorize the issuance of an injunction upon the application of a stockholder. It would be necessary to show that he was doing, or threatening to do some act, which if done, would result in great or irreparable injury to the corporation. As we have already stated, the writ of injunction is a preventive remedy, and only issued to restrain the commission of some real injury. Brown could not be restored to his office by a proceeding of this kind; a *mandamus* or *quo warranto* would be the proper proceeding for that purpose. We could not, in this suit, restore to him the books and papers which may have been taken from him, nor anything else belonging to his office. Whether he is entitled to anything belonging to the office, or has a right to do anything connected with it, can only be determined by trying his right to the office itself, which can not be done upon an application for an injunction. But the prayer of the bill is: "That the said defendant, his agents, servants and employes, be enjoined and restrained from interfering with the books and other property of the said Magnolia G. & S. M. Co., and from exercising any of the functions of treasurer, trustee, superintendent or secretary, except to hold possession of said books and papers of said company, subject to the order of the court." In other words, the court is asked to stop all the operations of the corporation, to virtually remove the defendant from four offices, and to prohibit the keeping of any books for the concern, because the defendant refuses to allow Brown to act as president and trustee. To grant the prayer of this bill would look very much like punishing the stockholders by the closing up of their mine for the misconduct of one of the officers; a misconduct, too, which does not appear to be in any wise prejudicial to the company.

Whether Brown, as president or trustee, would be entitled to the possession or control of any of the books which the de-

fendant is charged with having seized, does not appear. The presidents of such institutions are usually things of ornament rather than utility, and there is nothing in the bill in this case to satisfy us that that officer in the Magnolia company is an exception to the general rule. The plaintiff's bill does not show that the defendant was not alone entitled to the control of the books taken by him, nor that the keeping of them by him will result in any serious injury to the company, while it is self-evident that to prohibit the working of the mine and the keeping of the books would be likely to occasion such injury. An injunction may probably be issued on the application of a stockholder to restrain the doing of some act by the officers, which, if done, would result in injury to the company; but if the act be done, an injunction can afford no remedy. If an officer is wrongfully removed from his office it can not restore him to it; if the books are already taken, this writ can not compel their return, nor restrain interference with them, unless such interference is likely to result in real injury to the corporation, which in this case is not shown. We conclude, therefore, that there is nothing in this first charge against the defendant warranting the issuance of the writ.

The substance of the next allegation is, that the defendant, without the consent of the board of trustees, removed the office of the company from the place established for it to some other part of the city of Austin, and from place to place, thereby concealing the same from the said president and stockholders of the said company. Well, what remedy an injunction can afford for the itinerant proclivities of the office of the Magnolia company is difficult to discover. For aught that appears in this case, the defendant had a right to move the office as often as he chose, or to whatever locality might suit his fancy. Such being the case, he might have carried it in his breeches pocket, or his hat, and we know of no way in which the writ of injunction would aid the plaintiff in discovering it. If, without the authority or the right to do so, the defendant was about to remove the company's office, and it was shown that such removal would occasion damage to the stockholders, an injunction might be granted. But no such representation is made. The office, it seems, has already been moved, and a future removal does not seem to be appre-

hended; but if it were, the removal of an office, the location of which is not known to the plaintiff, can not result in very serious injury to him, and may possibly enable him to discover it, whilst at present it appears to elude all search. However, the object of this proceeding is not to restrain the peregrinations of the company's chief office, but to enjoin the defendant from interfering with the books and other property belonging to the corporation; hence this allegation in no wise tends to further or aid the object of the bill. It is, then, alleged that "The defendant having so ousted the president and trustee of said company, and having entire possession of the books and other property of said Magnolia company, wrongfully and unlawfully and without authority has canceled stock of said company belonging to J. W. Brown, a stockholder in said company, and has transferred stock of said company belonging to said Brown to himself, without the knowledge of the said Brown."

If in fact the defendant has, as charged in this count, unlawfully issued stock to himself, the company has a complete remedy at law against him; and with a proper showing an injunction would issue to restrain him from transferring such stock to any third person; but that is not the remedy sought by the plaintiff. Nor does this allegation make a sufficient showing to entitle him to that remedy, even if he had asked it. To be sufficient for that purpose, a full statement of the facts constituting the illegality of the stock issued would be necessary, and he might be enjoined from issuing any more stock if it were satisfactorily shown that he was in fact unlawfully doing so; but the simple charge that he is unlawfully and wrongfully issuing stock to himself is not sufficient. That an act is wrongful or unlawful is usually a conclusion of law. The facts logically showing that act or acts to be so unlawful should be stated. It should be shown whose duty it is to issue stock, and under what circumstances it is authorized to be issued. There are no facts stated here to justify the conclusion that the defendant had not the right to issue the stock to himself. However, as the remedy sought is not an injunction to restrain the transfer of the stock so illegally issued, nor to restrain a further issuance, any further discussion of that portion of the allegation may be dis-

pensed with. The cancellation of stock belonging to Brown, and the transfer of it by the defendant to himself, are acts for which Brown has his legal remedy if he chooses to pursue it, but it gives the plaintiff no cause of action. If Brown himself does not wish to complain, the plaintiff, who is simply a stockholder in the company, has no right to complain for him. Brown himself could not obtain an injunction upon such a showing. He might recover his stock, or damages for its conversion, in a proper proceeding, but he could neither obtain the return of his stock nor its value in damages through the medium of an injunction. To enjoin the defendant from interfering with the books of the company would not restore Brown's stock, nor does it appear that there is any more stock that the defendant can cancel; an injunction, therefore, would seem to be useless.

The next charge against the defendant is, that he deposited money which he had in his possession, belonging to the company, with a mercantile house in the city of Austin, and while such money was so on deposit, refused to pay certain creditors of the company their just claims against it. The plaintiff's bill gives no reason why the defendant should not have deposited the money as he did. In the absence of special circumstances, we presume it was his duty to deposit it where it would be most secure. That he has not done so, does not appear from the bill. The defendant may have considered Cook Brothers, with whom he made the deposit, as safe as any of the banking institutions of the city, and we know of nothing making it his duty to deposit it with one more than the other—with a banking more than with a mercantile house. Of course, it is safer for the officer to follow the usual custom; but if he does not, it can not be considered a breach of duty, unless it be made to appear that the course pursued by him is not as safe as that usually pursued. But he refused to pay the creditors of the company whilst the money was so deposited, and by reason of that fact it is alleged that the corporation, and the plaintiff especially, were greatly damaged. In what particular manner this great damage was occasioned, is not shown; whether it was a real pecuniary injury to the company, or only a damage to its credit, is not yet made apparent. What if it were both?

It does not follow that the defendant is blamable, for the plaintiff's bill does not inform us that it was the defendant's duty, or indeed that he had any authority whatever to pay the claims spoken of. If it were specifically alleged that it was made the duty of defendant to pay all just claims against the company, the bill would then, perhaps, tend to show a dereliction of duty on his part; but as it now stands it does not show even the slightest deviation from his duty in this respect.

The next charge against the defendant is that he is applying for a patent, under the laws of the United States, for the Magnolia mine, and is thereby involving the company in proceedings which will, if persisted in, result in great damage to the stockholders. If the application for the patent is on behalf of and for the benefit of the company, the defendant would seem to be simply discharging his plain duty. An application for a patent in the regular way, and in accordance with law, appears to be an advantage rather than a detriment to the company. There may be some circumstances connected with the matter which would place a different phase upon it, but nothing of the kind appears in the bill. We find the simple allegation the substance of which is stated above. If the application for a patent was likely to be prejudicial to the company, the facts showing such to be the case should have been fully stated, so that the court might itself judge whether it would be injurious or not. The allegation in its present form is nothing more than an expression of opinion by the plaintiff that the application for a patent would be injurious to the company. That is not sufficient; the facts logically showing that such would be the effect should have been stated.

It is next alleged that defendant is "working the said mine for the said company without any control from the board of trustees empowered to supervise the working of the same and contrary to the order of the said president." It is not alleged that the mine is being worked in a manner injurious to the stockholders. Nor indeed is there anything in the bill to justify the conclusion that the mine is not being worked in the best manner possible and to the entire satisfaction of all the stockholders except the plaintiff. The president probably

has no more authority or power with respect to working the mine than the defendant has. That the defendant refuses to submit to the control of the board would not therefore seem to be a very strong ground for the interposition of equity. If the defendant is managing the mine judiciously and in furtherance of the best interests of the stockholders, it would be unjust to stop all operations simply upon the application of one dissatisfied stockholder, and upon such a showing as is made here, it can not be done.

The bill concludes with the allegation that the defendant is continuing and threatening to continue the unlawful and wrongful acts complained of, to the great damage of the stockholders and especially to the plaintiff. But as we have endeavored to show, none of the acts complained of authorize the issuance of an injunction, most of them not even showing the slightest cause of complaint. To allege that the defendant is continuing them can not, therefore, aid the plaintiff's case, and the bill taken as an entirety can satisfy no one that any great injury or damage to the company is likely to result from the possession and control of the books and the management of its property by the defendant.

Although it is quite apparent from the record that the New York and Austin Silver M. Co. should have been made a party to this action, still as that question was not raised by counsel, and as our present conclusion is against the plaintiff, it was thought best to pass upon the merits of the bill itself.

The judgment of the court below is affirmed.

By JOHNSON, J., concurring.

The affirmance of the order of the lower court meets my approval on this distinct ground, that the plaintiff shows no right in himself to maintain the action. Suit was brought by Sherman as plaintiff in his individual name, whereas he shows by the complaint that the seventy-nine and a half shares of Magnolia company stock were held by him exclusively in the character of a trustee for the Austin Silver M. Co., a foreign corporation. It is not even shown by the pleading that the plaintiff is a stockholder, or has an interest in either of the corporations; nor are there any special circumstances

appearing to authorize him to wage a contest with defendant concerning any of the alleged grievances. To all intents and purposes the plaintiff, by his own showing, is so far an outsider that he could not properly bring the action in his individual name. This point, it is true, was not taken by respondent on the argument, nor does the record disclose the particular grounds, as it need not, on which the court below refused the injunction. But if the decision of the district court be right, although the reason be wrong, surely this court should not disturb it. Much less, therefore, the propriety of doing so, because the respondent's counsel overlook a material point in the case, and perhaps the most tenable ground upon which the decision can be sustained. The duty of this court, as I understand it, is to decide upon the entire record of the case as presented, and not in conformity with the peculiar views and arguments of counsel. The ruling of the district court in refusing the injunction, is clearly defensible on the ground stated, whereas upon the points discussed—some of them at least, in my view—it may be more questionable. Yet as this appeal is merely from an interlocutory order, pending the trial of the cause on its merits, I shall not anticipate the district court in passing upon any of these questions now.

¹LYON V. WOODMAN ET AL.

(2 Legal Gazette 81. District Court, 3d District, Utah Territory, 1870.)

Facts of the case—Insufficient showing for injunction—Claims bought with knowledge of adverse title. Complainant averred the discovery and the location of discovery claim, and the location of claim No. 1 on the St. Louis lode, by one Brain, in 1865, and of No. 2 by one Nichols, compliance with the mining laws, working, etc., viz.:

That complainant in 1868, was working claim No. 1, expended large sums and disclosed a rich vein; that during that time he let a contract to Woodman on the lode, and that Woodman, though knowing the claim to belong to Brain, pretended to make a discovery and location of his own on the lode. The bill further averred that complainant was the

¹ Commonly cited as *The Emma Mine Case*.

owner of the titles of Brain and Nichols, but not stating how or when he became such owner. Defendant's answer showed the decease of Brain, and a probate court sale of Brain's interest (without notice to the heirs.) and the purchase of the same by the plaintiff upon a speculating contract for \$1,000, and a twelfth interest in case of successful suit, etc., from the assignee at the probate sale; averred that the contract made between plaintiff and Woodman related to other property, long since abandoned, and denied the identity of the property sued for, and alleged that defendant had discovered and located the Emma lode in 1868; that plaintiff made no claim for the premises until 1870, when defendants had developed their great value: *Held*, no cause for injunction, because: 1. The bill did not make a sufficiently specific case, not showing how title accrued; 2. All the equities of the bill were denied, and the facts not only denied but evidently in great doubt; 3. The complainant was guilty of laches; 4. Taking the bill and answer together, it showed no case addressed to the discretion of the court, nor admitting of equitable interference.

¹ **Discretionary power in court.** The granting or continuing of injunctions necessarily involves the exercise of a certain amount of discretion, the limits of which can not be fixed by any adjudged case.

Disputed title. An injunction to stay the working of a mine may be granted notwithstanding a question of title is involved. But the fact of the title being involved will add to the caution of the court in granting it. It is not necessary for a plaintiff to establish his title by a suit at law where it is not doubtful and not in dispute. But if disputed and in doubt, a court of equity will not settle it for him. He must show a *prima facie* case, free from reasonable doubt, and a case free from the imputation of laches.

Laches. The delay of two years in bringing suit for injunction to restrain the working of a mine, is a fact seriously affecting the claim for an injunction.

Judicial notice of suits affecting the mine. In applications for injunction a judge may take judicial notice of the files of his own court showing suits involving the legal title to the property.

² **Plaintiff's standing—Speculative purchase from ousted claimant.** The inadequacy of price paid by plaintiff seeking an injunction, and the fact of his purchasing while the mine was in the adverse possession of other parties, considered as reasons for refusing injunctive relief addressed to the discretion of the court, and injunction refused accordingly.

Relief as between trespassers. It is not sufficient to show the defendant a trespasser, where plaintiff has himself no better standing.

This is a bill in equity praying for an injunction to restrain the defendants from further working a certain silver mine claimed by the plaintiff, in the "Little Cottonwood Cañon, in what is known as Mountain Lake mining district," de-

¹ *Chambers v. Alabama Co.*, 67 Ala. 353.

² *Munson v. Tryon*, 7 M. R. 469.

scribed as follows: "Discovery claim, and claims numbered one and two, southeasterly from said discovery claim on the Saint Louis lode," etc.

In his bill of complaint and accompanying affidavit the plaintiff alleges "that the said claims were located and recorded August 28, 1865, by Silas Brain, now deceased, and one D. C. Nichols; the discovery claim and number one having been located by the said Silas Brain, and number two by the said Nichols, who were the locators of said claims, and first possessed and occupied the same; and they, by said discovery, location and possession became lawfully possessed thereof, and acquired an indefeasible title thereto against all persons whomsoever; and their said title and right of possession become absolute, except as against the paramount title of the United States government thereto," etc. And "that said Brain and Nichols, in locating and holding said claims, complied with all the laws, rules, customs and regulations of the said Mountain Lake mining district; and by virtue of the said laws, customs and regulations, their right, title and possession to said claims became absolute and indefeasible": 14 Stat. at Large, p. 251.

The plaintiff further alleges, in his bill and affidavit, that in the months of October, November and December, 1868, he, the plaintiff, was engaged in mining and developing said claim number one; that he expended considerable sums of money therein; that thereby he developed a rich vein of argentiferous galena ore on said claim; that on or about the 18th day of October, 1868, he, the plaintiff, let a contract to the defendant, Woodman, to do work for him, the plaintiff, on the said claim number one; that he then paid to Woodman, on such contract, the sum of \$75, and placed in his hands the further sum of \$25 to pay for work already done; that Woodman knew that said claim numbered one belonged to Silas Brain; that on the 1st day of July, 1869, some of the defendants, and afterward the rest of the defendants, unlawfully entered upon said claims numbered one and two; that the mine on claim numbered one is worth five hundred thousand dollars and upward; that the defendants are still mining thereon and have taken therefrom and converted to their own use ore and minerals to the value of two hundred thousand dollars and up-

ward; that the defendants claim the said mine through the defendant, Woodman, who claims to be the discoverer and locator thereof, and that unless the defendants are restrained by injunction they will exhaust the said mine and do the plaintiff an irreparable injury.

The plaintiff claims to be now the owner by purchase and conveyance of all right and title of Brain and Nichols in and to the said mining claims, but he omits to state when he became such. He alleges that he has commenced an action on the law side of this court, against the defendants, to recover the possession of said claims, numbered one and two. All the material allegations of the plaintiff are strongly corroborated by the affidavits of several other persons.

On the part of the defendants certified copies of certain records in the office of Elias Smith, probate judge in and for the county of Salt Lake, are produced. From these records it appears that the mining claims described in the plaintiff's paper as discovery claim and claim number one were part of the estate of Silas Brain, deceased; that the heirs of said estate, consisting of a brother and sister, reside in England (the records do not show that these heirs had any notice of these proceedings); that the titles to nearly all of said Brain's mining claims are in dispute; that on the 21st day of July, 1870, the said probate judge ordered the administrator to sell the said mining claims at private sale; that at such private sale Stephen A. Mann became the purchaser of said discovery claim and claim number one for one thousand and twenty-five dollars; that said Mann also agreed to pay one thousand dollars additional and one twelfth interest in said claims, or such part thereof as shall be possessed and recovered by said Mann, or his assigns, in any suit or action at law that the said Mann, or his assigns or grantee, shall hereafter institute to recover the same—the said property being in whole or in part adversely held and occupied; that such sale was subject to the conditions of a certain contract between the plaintiff herein and the said Mann, which was filed in the said office; that in and by said contract it appears that on the 27th day of August, 1870, the said Mann sold to the plaintiff herein the said discovery claim and the said claim number one for one thousand and twenty dollars in money; that in and by the same con-

tract the plaintiff herein agreed to institute and carry on, in the courts of this Territory, such action or actions at law as should be necessary to remove certain persons who were trespassing upon said mining ground; that in the event the plaintiff should be successful in such actions he would pay to Mann the further sum of one thousand dollars and give to him the one twelfth interest in the property; that Mann should not be liable for any of the expenses of such litigation; that the plaintiff might sell a portion of such claims to raise money to pay for professional or other services in such litigation; that the plaintiff should pay to Mann one twelfth part of the net balance of the money arising from such sales, and give to him the one twelfth interest remaining after recovering the possession of the said claims.

The defendants dispute the *bona fides* of this transaction, and charge that it was corrupt and fraudulent.

The defendant Woodman, by affidavit, alleges that about the 1st of September, 1868, the plaintiff furnished him, Woodman, and the defendant Chisholm, about \$25 in provisions, and in October, 1868, the sum of \$75 in money, to prospect a certain claim known as the "Susquehanah," he, the plaintiff, to have one third interest therein; that such provisions and money were thus expended; that he, Woodman, never received any other money from the plaintiff; that the mining claim now in the possession of the defendants is not the said "Susquehanah," which was abandoned; that he never was in the employ of the plaintiff in any capacity, and never made with him any such contract as the plaintiff sets forth; that he, Woodman, never heard of nor from the plaintiff from about the middle of October, 1868, until August, 1870; that the mine possessed and worked by defendants, known as the "Emma" mine, was never in the possession of the plaintiff, and was never discovered nor located by Silas Brain; that it was discovered and located by him, Woodman; that he went upon and commenced opening it in November, 1868; that about the 25th day of August, 1869, at the depth of ninety-five feet, he discovered a permanent body of ore; that he duly located and recorded the same as the "Emma" lode; that until the spring of 1870 the said "Emma" mine was known in the said district as the "Woodman" mine, and has never

had any other name or designation; that he has been in the quiet, peaceable and undisturbed possession of the said mine since November, 1868, without any knowledge, suspicion or intimation of any adverse claim thereto by any party or parties; that the other defendants obtained their interests therein through and from him; and that he and his co-defendants have expended not less than sixty thousand dollars in prospecting, developing and getting the said mine into a paying condition. All the material allegations of the defendant Woodman are strongly corroborated by the affidavits of other defendants and other persons. It appears, also, that the defendants are pecuniarily responsible for more than half a million dollars.

C. H. HEMPSTEAD and H. A. JOHNSON for the plaintiff.

MARSHALL & CARTER, E. S. JOSLIN and R. H. ROBERTSON, for the defendants.

Opinion by McKEAN, C. J. September Term, 1870. Salt Lake City.

That the court has power to grant or refuse an injunction herein is unquestioned, and in deciding which to do the court is left free from all arbitrary rules. "The granting and continuing of injunctions, although requiring judicial authority, rests in the discretion of the court, to be governed by the nature of the case." Hilliard on Injunctions, p. 15, Sect. 17. "The extent to which the jurisdiction may be carried is not marked out by any adjudged case, and from the nature of things it must forever remain undefined." Willard's Equity Juris. 408; *Cobb v. Smith*, 16 Wis. 661; *Hicks v. Michael*, 15 Cal. 117; *Burnett v. Whitesides*, 13 Cal. 158. "An injunction ought not to be granted except for the prevention of great and irreparable mischief. It can not be demanded as a matter of right, but the granting of it must always rest in the sound discretion of the court." *Hine v. Stephens*, 33 Conn. 497; *Whittlesy v. Hartford R. R. Company*, 23 Conn. 421; *Hicks v. Michael*, 15 Cal. 116; Story on Equity, 928; *Henshaw v. Clark*, 14 Cal. 460; *Kidd v. Dennison*, 6 Barb.

9; *Waldron v. Marsh*, 5 Cal. 120; *Hess et al. v. Winder et al.*, 34 Cal. 270; *Reddall v. Bryan*, 14 Md. 444.

To justify the court in granting an injunction, it should clearly appear not only that the defendants are in the wrong but that the plaintiff is in the right. The court will not balance probabilities or uncertainties and give the plaintiff the benefit of doubts. "On a motion for a preliminary injunction, the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact." *Parker v. Sears*, 1 Fish, 93; Brightley's Federal Dig. p. 456, Sec. 154; *Hill v. Commissioners*, Parsons' Select Cases in Equity, 501. "In general, clear, legal or equitable rights, free from reasonable doubt, must be satisfactorily shown to authorize a preliminary injunction." Hilliard on Injunctions, p. 14, Sec. 16; *Steamboat Co. v. Livingston*, 3 Cow. 713. "It is an appeal to the extraordinary power of the court, and the plaintiff is bound to make out a case showing a clear necessity for its exercise." *Id.* and *Auburn v. Douglass*, 12 Barb. 555. "It is the duty of the court rather to protect acknowledged rights than to establish new and doubtful ones." *Id.* and *Booth v. Discoll*, 20 Conn. 555.

Although a court of equity, upon an application for an injunction, can not decide the question of title to land, yet if it appear that the title is doubtful or in dispute that fact should add to the caution with which the court considers the question of granting the injunction. "Equity will not restrain, by injunction, the working of a mine, or other trespass, until the title, if disputed, has been settled at law, except in extreme cases." Adams' Doctrine of Equity, p. 210, Note; *Hart v. Mayor of Albany*, 3 Paige, 213. "An injunction to stay waste will not be granted where the right is doubtful, or where the defendant is in possession claiming adversely, and the plaintiff has brought an action of ejectment to recover the possession at law, and which is undetermined." *Storm v. Mann*, 4 Johns. Ch. 21. In the case last cited the chancellor said, "The title appears to be disputed," etc. "I must know the result of that issue at law before I can interfere." See also, *White v. Booth*, 7 Verin. 131; *Caldwell v. Knott*, 10 Yerg. 209; *Reid v. Gifford*, 6 Johns. Ch. 19. "Yet the complainant will not be first required to establish his right at law,

unless it is doubtful and in dispute." *Id.* and Hilliard on Injunctions, 2d Ed., p. 26, Sect. 35. "To entitle the plaintiff to an injunction he must show a strong *prima facie* case in support of his title, and must not be guilty of any improper delay in applying for relief." 19 U. S. Dig., p. 384, Sec. 11. "If the plaintiff make out a *prima facie* case for an injunction the defendant must overcome it by testimony." Brightley's Federal Dig., p. 457, Sec. 191. "A court of chancery will not grant a preliminary injunction when the main question in the case is being investigated by a court of law; the question of right must first be settled." *Attorney-General v. City of Paterson*, 1 Stockt. (N. J.) 624.

The lapse of time which can bar an action at law must be fixed by statute; but in equity the question whether a plaintiff, who applies for an injunction, has been guilty of improper delay, is addressed to the discretion of the court. "If the plaintiff permit the defendants to remain in possession of a mining claim several months without interference, working it as their own and expending large sums of money in developing it, a court of equity will require a very clear and strong showing to induce it to grant or sustain a preliminary injunction to stop the work." *Real del Monte Mining Co. v. Pond Mining Co.*, 23 Cal. 82; see *Reid v. Gifford*, 6 Johns. Ch. 19. "Acquiescence, although not in the sense of conferring a right on the opposite party, but merely in the sense of depriving the complainant of his right to the interference of a court of equity, will, of course, defeat the application for an injunction." 19 U. S. Dig., p. 384, Sect. 12.

A plaintiff has no right to the extraordinary writ of injunction where his rights may be secured by the ordinary remedies of a court of law. "No suit can be sustained in the equity courts of the United States, where, a plain, adequate, and complete remedy may be had at law." *Barber v. Barber*, 21 Howard, 591. "Where the remedy at law is complete and adequate an injunction will not be granted." *Winnipeg Lake Co. v. Worster*, 9 Foster, N. H. 433. "If there be no impediment to a judgment at law, or to adequate legal relief, an injunction ought not to issue." *Burnett v. Whitesides*, 13 Cal. 158; *Leach v. Day*, 27 Cal. 643.

Are these principles of law applicable to the case at bar?

1. Almost or quite every material fact stated in the papers of the plaintiff is flatly denied or contradicted by facts on the part of the defendants. Such disputed questions of fact would be more in place before a jury in a trial at law than before a court of equity on an application for an injunction.

2. It does not appear from the papers that the plaintiff had any pretense of title when, in the fall of 1868, he commenced mining on "claim number one." It would seem that he was merely a trespasser on the rights of Silas Brain; indeed his own statements show it. It is not sufficient for the plaintiff to allege or to show that the defendants have also trespassed on Silas Brain. He must show not only that the defendants are in the wrong, but that he is in the right.

The plaintiff seems to have had not even a color of title until the 27th day of August, 1870, at which time occurred the transactions between him and Stephen A. Mann. Whether the probate judge had jurisdiction and authority to order the sale, privately or otherwise, of the mining claims of Silas Brain, deceased; whether the rights of the heirs of said Brain have been protected by the proceedings in the probate court; whether the transactions by and between the plaintiff and said Mann were valid or void, fair or fraudulent, are questions to be considered when the action of ejectment between the parties hereto comes up for trial on the law side of this court. The fact that such questions are pending in the action at law should add to the caution of the court in this action in equity. The plaintiff claims to have bought for \$1,020, and certain conditional promises, a mine which he alleges is worth more than five hundred thousand dollars, knowing that it was adversely held by parties, some of whom had worked it more than a year and a half, and who had expended sixty thousand dollars upon it, he, the plaintiff, agreeing to bring an action at law to dispossess them. That the plaintiff may bring his action at law, and, if possible, get possession of the mine, can not be denied. But if a court of equity were to grant him an injunction on the ground that if they were not restrained the defendants would do him an irreparable injury, it would be an extraordinary exercise of the extraordinary power of the court.

3. Even if the plaintiff had commenced mining in the

fall of 1868, under color of title, which was not the case, his delay for nearly two years to bring his action against the defendants, though it would not affect his title, had he possessed one, would seriously affect his claim for injunction.

4. The plaintiff has brought an action in ejectment, on the law side of this court, to recover the possession of the mine which he claims; and the official files, of which the court may take notice, show that an issue was joined in that action twenty days ago. This court was then and still is in session. Why has not that action at law been brought to trial? It would seem that the plaintiff has a "plain, adequate and complete remedy at law," which he has failed diligently to prosecute.

While courts should always carefully inquire into and guard the rights of the parties before them, they should also and especially in a case in a community and at a time like the present, look above and beyond the parties. In *Irwin v. Phillips*, 5 Cal. 146, the Supreme Court of California says, "courts are bound to take notice of the political and social condition of the country which they judicially rule." And in *Merced Mining Company v. Fremont*, 7 Cal. 325, the court quotes this sentiment and says: "It is as just as its expression is concise and appropriate," and adds that "courts, knowing the political and social condition of the country are equally bound to apply the rules of law and the principles of enlarged reason to the new circumstances of a people."

Though the Territory of Utah lies contiguous to the great mining districts of other States and Territories, and though for more than twenty years it has had a considerable population, its valuable mines are but just beginning to be developed. It will not be surprising if many cases of contested titles shall arise. The law power of the courts is available to all, and so are their equity powers; but the latter should be exercised, in the granting of injunctions, with extraordinary prudence.

The motion for an injunction is denied.

THE COLE SILVER MINING CO. V. THE VIRGINIA AND
GOLD HILL WATER CO. ET AL.

(1 Sawyer, 470. U. S. Circuit Court, District of Nevada, 1871.)

Parties beyond jurisdiction. A person who resides beyond the jurisdiction of the court, although named as a defendant in the bill, is substantially not a party to the action until he is served, or till he appears.

Tort-feasor beyond jurisdiction not a necessary party. In an action against joint and several tort-feasors to restrain the diversion of water, if one of the defendants resides beyond the jurisdiction of the court, so that he can not be served with process and does not voluntarily appear, the bill may be amended by omitting his name, and the court will exercise jurisdiction as to the remaining defendants.

Trespass not excused by plaintiff's incapacity. One who has trespassed upon water rights acquired by a mining company will not be allowed to defend on the ground that the mining company had no legal capacity to acquire water rights. As between the party despoiled and the wrongdoer the courts will not enter upon this inquiry.

Diversion of water enjoined to extent of requiring affirmative acts by bulk-heading tunnel. While excavating a tunnel for mining purposes the complainant struck a seam in the rock, from which flowed a stream of water, which it claimed and appropriated. Subsequently, defendants ran a tunnel into the mountain to a point below complainant's tunnel and drained the latter, and the defendants thereupon appropriated the water: *Held*, that complainant was entitled to an injunction to restrain such diversion and appropriation by defendants even though it should be necessary for defendants to fill up, or build a water-tight barrier across their tunnel to accomplish the end sought.

Application for preliminary injunction heard on bill and affidavits. Complainant is a corporation organized for the purpose of mining for silver. Its grantors took up a ledge supposed to contain silver ores, situate on the side of the mountain, above Virginia City. Complainant excavated a tunnel, commencing in a ravine some distance below the croppings of its ledge, on the surface of the mountain, and extended it into the mountain to and through its ledge, at a considerable depth below the surface. In excavating the tunnel, complainant struck a seam in the rock, from which flowed a stream of water, which it claimed and

¹ S. C., *post*, p. 516.

² U. S. v. *Parrott*, 7 M. R. 336.

³ *Plant v. Stott*, 6 M. R. 175; *Lane v. Newdigate*, 10 Ves. 193; *Lance's App.*, 55 Pa. St. 17.

appropriated in accordance with the custom in force. The water so discovered and appropriated, the complainant leased to the Virginia and Gold Hill Water Company, a corporation organized to supply water to Virginia City and Gold Hill, one of the defendants, upon certain designated terms. Said water company paid the stipulated rents and enjoyed the water under said lease for the agreed term. The water was conveyed to Virginia City and sold to the people for various domestic and other uses. Other parties also took up sundry ledges or mining claims on the same mountain. Some claimed to be in front, and some in the rear of complainant's ledge. Some of the claimants started a tunnel to run to their ledges, commencing lower down the mountain and at a considerable distance to the southward of the entrance to complainant's tunnel. The excavation of this tunnel, called the Nevada tunnel, was prosecuted at times, and the work suspended at times for several years. Finally, the said several defendants, some of whom had acquired a portion of the interest of the original parties in said Nevada tunnel, entered into a contract to extend the said tunnel into the mountain till they should strike the ledge called the Macey ledge—the location of which is left very much in doubt by the affidavits, but it can not be west of or beyond complainant's ledge—or till they should strike water.

It is unnecessary for the purpose of illustrating the points decided to specify the terms of the contract, or to state more specifically the facts. Under this contract the defendants continued to excavate said tunnel in such a line as to strike a point at a lower altitude, directly below the point where complainant discovered and appropriated the water in its tunnel; and they so timed it, that they reached the said point not far from the time when said lease from complainant to the said defendant, the Virginia and Gold Hill Water Company, expired. The complainant insists that defendants extended the said tunnel expressly to take this water; and the defendants, that their object was to prospect ledges lying in the rear. But it did not appear to the satisfaction of the court, that the claim to any ledge mentioned lying *in the line of the tunnel* to the west or rear of complainant's ledge, was located prior to the location of complainant's claim. When the defendants

were approaching the point under complainant's tunnel, the complainant filed a bill in this court, stating what it claimed to be the facts; that defendants were running to the point referred to for the purpose of cutting off its water, that they would soon reach the water and intercept it, and prayed an injunction to restrain them from proceeding further. While the motion for injunction was pending, the defendants reached the point, and the water thereupon ceased to flow in complainant's tunnel, and was diverted through defendants' said tunnel, and appropriated by them. Thereupon the five years mentioned in said lease having expired, complainant dismissed its first bill and filed this bill, setting up the new facts, and applied for an injunction to restrain the continuance of said diversion till the final hearing. The value of the water is alleged to be two hundred dollars per day. Since the diversion, it has been taken by defendants at the mouth of their own tunnel, and conveyed to Virginia City for sale as before.

The foregoing is a sufficient summary of the facts as they appear in the bill and affidavits, to explain the points of the decision, without being more specific.

MITCHELL & STONE and S. W. SANDERSON, for complainant.

R. S. MEESICK, for defendants.

SAWYER, Circuit Judge.

As to the question of jurisdiction, the defendant, Glauber, has never been served, and he has not appeared. The bill shows that he is a resident of California, so that he can not be served, and the court can not acquire jurisdiction of him in the action unless he voluntarily appears. Although named in the bill, with a prayer that process issue and he be made a defendant, yet he is substantially not a party to the action until he is served or till he appears.

The twenty-second and forty-seventh equity rules do not seem to contemplate that a person can be a party in fact, till service or appearance. At all events, under these rules, when the making of a person a party, unless he is an indispensable party, would oust the jurisdiction of the court as to other

parties, he may be omitted for the purpose of exercising jurisdiction as to those other parties, whose rights can be determined without his presence: *Shields v. Barrow*, 17 How. 141.

Upon the omission of Glauber the court would have jurisdiction over all the other parties, and their rights as against the complainant may be determined without his presence. The acts complained of are *tortious*, and the cause of action is *several*, as well as joint. I do not think Glauber an indispensable party to the action. While the decree will finally settle the rights of the parties before the court, it will not bind him, and he may still litigate his claim with the complainant in another action, or he may voluntarily appear in this, for it is not to be presumed that he is in fact ignorant of the pendency of the suit. If Glauber is an indispensable party, it will be impossible for the court to restrain the commission of waste, the working or destruction of a mine, the diversion of water, the flooding of an upper riparian proprietor, or the erection or continuance of any nuisance, however offensive, dangerous or destructive to the rights of another, when the wrongdoer has an associate or confederate residing out of the jurisdiction of the court, or when the tort-feasor himself keeps beyond the jurisdiction of the court, and performs the tortious acts through his agents and servants. It is notorious, that in the mining regions of Nevada, Oregon and California, and all the mining territories, many trespasses and wrongs of the kind mentioned requiring the almost daily interposition of the courts, are perpetrated by parties having associates residing in other States. To deny relief against wrongdoers in such cases in this circuit, on account of the absence of one tort-feasor, would be to paralyze the right arm of the court in those cases wherein its effectual interposition is most imperatively demanded, and most frequently invoked. Let it be once established that the courts can not interfere, or grant relief in the absence of one of the joint tort-feasors, and the mining interests of all the gold and silver-producing States, will thereafter be at the mercy of any bad men, who, relying upon a confederate beyond the jurisdiction of the court to enable them to evade all redress for injuries committed, may choose to combine for the purpose of wrongfully availing themselves of the labors and discover-

ies of others. In my judgment, in such cases it would be far more equitable to compel the absent tort-feasor to appear and defend his right, or submit to any inconvenience that may incidentally result from the execution of any decree entered against his co-trespassers, rather than deny all redress, no matter how grievous to the injured party, because one of the wrongdoers withdraws and keeps himself beyond the jurisdiction of the court. In the one case the absent party may appear and have his rights adjudicated, if he so desires, and justice will be awarded to all; while in the other, the most grievous injuries must necessarily go wholly unredressed.

For example, can the courts of the United States properly refuse to redress clearly manifest injuries to its own citizens, by restraining the working of a gold or silver mine, waste, or the erection or *continuance* of a nuisance, because a citizen of Great Britain, residing in England, is interested in the profits of the wrong, or, himself safe in his retreat beyond the jurisdiction of the court, perpetrates it by means of his agents, servants and employees? The court, in such instances, must, from the necessity of the case, assume jurisdiction and proceed to a decree as to the parties before it, or sit helplessly by and permit an absolute failure of justice, by suffering our own citizens to be ruined with impunity by irresponsible, non-resident wrongdoers, or by parties in collusion with them.

On this principle of preventing a failure of justice, and even on grounds of convenience, courts of equity have often dispensed with parties interested in and affected by the suit, in cases calling far less loudly for such action than the class of cases to which this belongs: *Smith v. Hib. Mine Co.*, 1 Sho. & Lef. 240-1; *Rogers v. Linton*, Bunbury, 200, 201; *Attorney General v. Baliot College*, 9 Mod. 409; *Thompson v. Topham*, 1 Younge & Jer. 556; *Cockburn v. Thompson*, 16 Ves. 326; *Williams v. Whingates*, 2 Bro. Ch. 399; *Walworth v. Holt*, 4 Myl. & Cr. 635-6; *Taylor v. Salmon*, Id. 141-2; *Harvey v. Harvey*, 4 Beav. 220-2; *Reynolds v. Perkins*, Amb. 565.

In my apprehension, it is no good answer to say, that the injured party may have his remedy in the State courts, where service may be had on non-resident defendants by publication.

of summons. The constitution and the laws entitle parties in certain cases to seek redress in the national courts, and the class of cases mentioned is the very one in which the remedy in the national courts is most valued by litigants, and this circuit most frequently sought. Besides, it is a mere accident if the State laws admit of acquiring jurisdiction in this mode. I doubt whether many of the States, if any, east of the Rocky Mountains, authorize a publication of summons at all in that class of cases. If they do, when an action is commenced in a State court by a citizen of the State, and all the defendants are citizens of another State or foreigners, it is their absolute right to have a transfer to the national courts, and a transfer by the defendants served in the State would oust the jurisdiction, if any defendant should be a non-resident; for in the national courts service by publication could not be recognized. Thus there would still be an evasion of the remedy and a failure of justice.

To my mind there is an obvious distinction between torts of the class to which this action belongs, wherein the injury and right of action are *several* as well as *joint*, and actions of partition for the canceling of contracts, settlement of partnership affairs and the like, wherein the decree is not binding even on the parties before the court in the absence of a party in interest. Such were the cases of *Shields v. Barrow*, 17 How. 139, and *Barney v. Baltimore City*, 6 Wall. 280.

In *Marker v. Marker*, a tenant under a claim of right had sold to a stranger a large quantity of timber still uncut and standing on the premises occupied by him. A bill was subsequently filed to restrain the vendor from cutting the timber, in order that he might fulfill his contract of sale, but without making the purchaser a party. On objection for want of parties, the court held that the purchaser was not an indispensable party: *Marker v. Marker*, 9 Hare, 1, 5, 12, 16. This case determines the principle, for the decree must necessarily have affected the rights of the purchaser of the timber.

Had Glauber's name been omitted there could have been no question as to jurisdiction, and he has not been brought within the jurisdiction of the court by service or appearance. My impression is, that the jurisdiction is not ousted by merely naming him in the bill, when it appears that he can not be

served. Glauber himself is not present to make, and he does not make, the objection to the jurisdiction, and the other parties who do raise the objection are in no way affected by his absence, or by his being named in the bill. But, however that may be, since he might have been omitted in the first instance to prevent an ouster of the jurisdiction as to the other parties, I see no reason why the bill may not now be amended, before he is brought in, by omitting his name for the same purpose, without prejudice to the motion for an injunction, and the complainant asks leave to amend. I can perceive no good reason why leave should not be granted.

As to the merits. The leading and material facts alleged showing the right to the water in question, as between the parties to the action, are not denied by the affidavits of the defendants. The water, as is shown by the bill, was discovered and actually appropriated by the plaintiff, and was enjoyed by it for many years, it having been sold to and paid for by the defendant, the Gold Hill Water Company, for several years prior to September, 1870. The plaintiff, upon the facts alleged, was also necessarily in actual possession of the land out of which the water issued for the purpose of its tunnel, and of taking and enjoying the water, and so far as was necessary to the accomplishment of these objects. Upon the facts, as they appear in the bill and affidavits of the moving party, the complainant was the first actual appropriator of the water, and it acquired the right as against the defendants, if capable of so acquiring it.

It is urged that plaintiff was incorporated for mining purposes only, and that it, consequently, has no capacity to acquire a right to the water. But water is required for mining purposes, and in the before mentioned lease to the defendant, the Virginia and Gold Hill Water Company, the complainant reserved a portion of said water, sufficient for its mining purposes, and only sold the remainder.

So far as required for mining purposes, a capacity to acquire the right to water necessarily exists as incident to the business of mining. But suppose, in pursuing a mining enterprise, other valuable things are found in the path of the work, can not the corporation appropriate and use them to defray its many expenses, or enhance its profits? Must they

be passed by and allowed to go to waste for want of a capacity to make them available, when the corporation can in fact render them available and useful in contributing to the success of the main enterprise?

May it not avail itself of all the incidental results of labor necessarily expended in pursuit of the real object for which the corporation was created, because some of these results were not made a specific object to be attained?

If a company is incorporated to mine for silver only, must it discard any gold that it may find in its mine, or in excavating to reach its mine? or if it should chance to fall upon a nest of diamonds in the bowels of the earth while running a drift for its silver ores, must it pass by the glittering treasures with averted eyes, because it has no legal capacity to pick them up and appropriate them to the expenses of the work, or an enhancement of the profits of the enterprise?

Running a tunnel to enable the plaintiff to reach its ledge is certainly a legitimate part of the business of mining. Why may it not appropriate everything valuable, not belonging to anybody else, that turns up in the line of the excavation, to pay the expenses of the work, or enhance the profits of the investment? Is it not one of the incidents to the work which the party developing it may render available?

In the affidavits filed the defendants disclaim the idea that they are running the Nevada Tunnel for the purpose of obtaining the water in question, but insist that they are running for the purpose of developing mines belonging to other parties. To that extent then the Virginia and Gold Hill Water Company, at least, is itself doing that which it has no legal capacity to do.

But it is enough to say that the defendants, whether corporations or natural persons, are not in a position to defend a trespass, on the ground that the plaintiff has no legal capacity to acquire the right in question; that the plaintiff may, legitimately, acquire a right to sufficient water for its mining purposes, is clear. Having the capacity to a limited extent, at least, to acquire a water right, whether they have assumed to acquire a larger right than their wants justify, or whether they use the water discovered and appropriated in the progress of their work for other purposes than mining, is no concern of defendants.

A party who has trespassed upon the actual possession of the complainant can not defend on that ground. It is a question between the corporation and the government. By express provision of statute, corporations are usually limited in their purchases of real estate, for instance, to such as are actually necessary to the exigencies of their business. But suppose a much larger amount should be conveyed to a corporation than it was authorized to take, it would not be contended, I apprehend, that a trespasser who had taken possession of a portion of such excess of land, could successfully set up a want of capacity in the corporation to take as a defense to an action of ejectment by the corporation. As between the party despoiled and the wrongdoer, the courts will not enter upon this inquiry: *Far. & M. Bk. of Mil. v. D. & M. R. R. Co.*, 17 Wis. 372; *Austin Glass Co. v. Dewey*, 16 Mass. 94; *Whitman M. Co. v. Baker*, 3 Nev. 386; *Natoma Water & M. Co. v. Clarkin*, 14 Cal. 552.

The defendants do not admit that they have been running their tunnel for the express purpose of cutting off the water in question, as alleged in the bill. They would hardly have the boldness to set up a right to take the water from plaintiff if it is, in fact, the first appropriator.

They allege their object to be to reach and develop certain mining claims. I am by no means satisfied that it is not the sole object of all the defendants to the action to secure this water.

The Virginia and Gold Hill Water Company was organized for the purpose of supplying Virginia City and Gold Hill with water, and any other purpose, as an end to be attained, than the procuring of water, would be wholly foreign to the objects of its incorporation. And the other defendants do not satisfactorily appear to have any interest in the mining claims set out in the affidavits.

The contracts set out in the defendants' affidavits, beginning with the principal one of April 29, 1867, have all been entered into long since the complainant discovered and appropriated said water, and leased it to the first defendant named in the bill, and that contract expressly refers to water as the principal object sought. The subsequent contracts are stated to have been made in pursuance of the provisions of that con-

tract, and to carry it out. Water, then, from the date of those contracts, at least, must have been the object of the defendants and their grantors, and the supply of water in question was known to exist, for it had already been discovered and appropriated, and it does not appear that there is any other known supply on the line of the defendants' tunnel.

The tunnel, since that time, has been excavated in a nearly direct line toward a point some thirty feet in altitude immediately underneath the point where complainants appropriated the water, until said point was reached, and the water thereby taken.

There can be no doubt upon the facts as they now appear, that, but for the acts of the defendants in running their tunnel below that of complainant, the water which now flows through defendants' tunnel would still flow through the tunnel of complainant, as it was wont to do in times past. The water ceased to flow in complainant's tunnel within a few hours after it was struck in defendants' tunnel. Indeed, this is not denied. If then, the defendants excavated their tunnel expressly to cut off this water, before discovered and appropriated, and divert it from the complainant, their act is wrongful.

If, on the other hand, this was not their object, but the object was to prospect and develop claims owned by them, lying to the westward of complainant's ledge, and the water was necessarily diverted by running their tunnel at the place indicated, it was still wrongful, unless they had a right to so run it, regardless of the appropriation by complainant. Had they such a right?

Sic utere tuo ut alienum non lædas, is one of the time-honored maxims of the law, and I do not perceive why it should not apply in this case.

I know of no principle of law that permits one man to destroy the property of another, or invade the rights of another, in order to enable him the more conveniently to obtain access to, and use his own.

It may be that, in a mining country situated as this is, a court would not restrain a party from merely running a tunnel through his neighbor's ledge far below the surface, in order to reach his own, when it could be done without material

damage, and there is no appropriation of his neighbor's property involved in the proceeding. To do so, might be to throw unreasonable obstacles in the way of carrying on great and highly important enterprises. But however that may be, I know of no principle that would justify the owner of one ledge or mine, in absolutely destroying the mine or property of another, not held subject, or in subordination to, the right of the party working the destruction, in order to conveniently reach his own. This would be a palpable violation of the maxim cited.

Water is a highly important element in conducting mining enterprises in California and Nevada, and it is very generally known that it is scarce in Virginia, and the supply of this indispensable necessity for domestic and other uses to the people of Virginia City is almost all, if not wholly, derived from mining tunnels. A stream of water, therefore, thus found in a tunnel excavated for mining purposes, is often as valuable to the possessor as the mine itself, and to take any such supply of water from one who has acquired a right to it, by means of a tunnel excavated by another party not having a superior right, for the purpose of prospecting or working his own mine, is as clearly a violation of the maxim as the destruction of a neighbor's mine in the same mode.

The authorities cited to the point that, where one has a spring on his own land, supplied by percolating water, coming from his neighbor's premises, such neighbor may, by digging on his own land, cut off the supply, admitting them to be correct, do not appear to me to reach this case.

The defendants do not appear, by the affidavits, to have made the diversion by digging in their own lands. The water is not shown to have come from their own ledges or from their immediate vicinity, or from any land to which they have a prior right. It does not satisfactorily appear that any one of the ledges mentioned in the papers, lying west of or beyond complainant's ledge, that could be reached or prospected by defendants' tunnel, is a prior location to that of complainant's, or that defendants have a prior right to anything in the line of their tunnel to the west of complainant's ledge. The diversion is accomplished, taking the view most favorable to the defendants, by running a tunnel through other lands in

search of ledges claimed by themselves, and ledges, too, the location of which, if they have any real existence, seem as yet, and according to defendants' own affidavits, after a ten years' search, to be entirely unknown. In doing this, they ran directly beneath the place where the complainant appropriated the water on the same land, and cut it off from below. A very different condition of things from that which existed in the cases cited.

I presume it would not be maintained that defendants, in searching for their own mine, could run their tunnel for that purpose directly under complainant's tunnel for its entire length, and so near it that complainant's tunnel would fall in and be destroyed, or thus destroy any essential part of it not passing through defendants' own ledge, or ground to which they have a prior right. This would be an injury of a strictly analogous kind.

The facts are not fully developed, and without a full discussion of the point at this time, it is sufficient to say that, in my judgment, as the case is now presented by the bill and affidavits, the matters shown by defendants are not sufficient to overthrow the case made by the complainant. I think it very apparent, upon the case as now presented as between the parties, that the complainant has the prior right to the water, and that it has been wrongfully cut off and diverted by means of defendants' tunnel.

It is shown, and this does not seem to be seriously controverted, that the water can be restored by building a watertight wall or bulkhead across the tunnel at a point indicated. But it is urged that the injury has been committed, and that this being so, the court will not, on motion for a preliminary injunction, issue a mandatory writ, affirmatively commanding the performance of an act such as to fill up a tunnel, rebuild a wall that has been demolished, and the like; and so the authorities seem to be.

But while this seems to be an established rule, it also appears to be well established that the result sought may be accomplished by an order merely restrictive in form. For example, if the water of a stream be raised by means of a dam so as to wrongfully flood a party's land above, or obstruct with back water a mill situated higher up the stream, while

the court will not direct the defendant, in terms, to remove the dam, it will require him to refrain from overflowing the land or obstructing the mill, even though it be necessary to demolish the dam in order to obey the injunction. So if a party by means of a dam or canal should wrongfully divert the water of a stream from the mill of his neighbor, clearly entitled to it, the court would restrain the continuance of the diversion, even though an obedience to the injunction should render it necessary to remove the dam or fill up the canal: 2 Eden on Injunctions, by Waterman, 388; 3 Dan. Ch. Pr. 1767, and notes, last edition; *Robinson v. Lord Byron*, 1 Bro. Ch. R. 588; *Lane v. Newdigate*, 10 Ves., Jr. 192; *Rankin v. Huskisson*, 4 Sim., 6 Eng. Ch. 13; *Earl of Moxborough v. Brown*, 7 Beav., 29 Eng. Ch. 127; *Murdock's Case*, 2 Bland, 470-1; *Washington University v. Greene*, 1 Maryland Ch. 502-4; *N. E. J. R. Co. v. C. R. Co.*, 1 Coll., 28 Eng. Ch. 521; *Spencer & Son v. Bir. R. Co.*, 8 Sim., 8 Eng. Ch. 193.

Under these authorities, by whatever name judges may see fit to call the injunction, the defendants may be restrained from continuing to cut off and divert the water in question, even though it should be necessary for them to fill up, or build a water-tight barrier across the tunnel, to accomplish the end sought.

Upon the facts as now presented, I think the water is wrongfully diverted from complainant's tunnel by means of the tunnel of defendants, and that complainant is entitled to a temporary injunction restraining defendants from continuing the diversion till the rights of the parties can be more fully ascertained.

For the present I will fix the amount of the injunction bond at \$15,000, with leave to defendants to move to increase the amount, at any time, if this amount be deemed too small.

Let an order be entered granting leave to complainant to amend its bill by striking out the name of Glauber as a defendant, without prejudice to the motion for an injunction, and upon such amendment being made, and on filing a bond to be approved by the clerk or district judge, in the sum of \$15,000, that a writ of injunction be issued by the clerk in the form indicated, restraining the defendants, their attorneys,

agents and servants from further, by means of their tunnel or otherwise, taking or diverting the water, or any portion thereof, which heretofore flowed from complainant's ledge, and from the spring or point mentioned in the bill of complaint, about forty-eight feet west of said ledge, through and out of complainant's tunnel, or which would flow into and through said complainant's tunnel from said sources but for the defendant's tunnel; and from receiving said water, or any part thereof, into and through said defendants' tunnel, and thereby depriving the said complainant thereof, until the further order of the court.

**¹THE COLE SILVER MINING COMPANY V. THE VIRGINIA
AND GOLD HILL WATER COMPANY ET AL.**

(1 Sawyer, 685. U. S. Circuit Court, District of Nevada, 1871.)

Parties beyond jurisdiction—Severable interests. It is a general rule in equity that all persons materially interested in the matter in controversy should be made parties, in order that complete justice may be done and a multiplicity of suits be avoided. If, however, some of the parties reside beyond the jurisdiction of the court, and the interests of those present are severable from the interests of those absent, the court will proceed to a decree.

²Preliminary injunction requiring substantive act. In special cases a court of equity will, on a preliminary application, issue an injunction, in a restrictive form, though its obedience would require the performance of a substantive act.

³Answer upon information. Denials of the equities of a bill, if made only upon information and belief, will not justify the dissolution of an injunction, and the allegation of new matter upon information and belief is equally objectionable.

Motion to dissolve an injunction on bill and answer. The facts sufficiently appear in the opinion, and in the report of the same case before SAWYER, circuit judge, on motion for an injunction: 1 Saw. 470.

¹ S. C., *ante*, p. 503.

² *Mexborough v. Bower*, 2 M. R. 92; *Falmouth v. Innys*, Mosely, 87; 7 M. R. 503, note 3.

³ *Moore v. Ferrell*, 7 M. R. 281; *U. S. v. Parrott*, 7 M. R. 336.

COLE CO. V. VIRGINIA AND GOLD HILL CO. 517

MITCHELL & STONE, and S. W. SANDERSON, for complainants.

R. S. MESICK, and WILLIAMS & BIXLER, for defendants.

FIELD, J.

This is a motion to dissolve an injunction issued upon the bill of complaint. It is made upon three grounds:

1. That Herman Glauber, who is a citizen of the State of California, is an indispensable party defendant in the suit, without whose presence the court can not proceed to a decree.

2. That the injunction, though preventive in form, is mandatory in fact, and an injunction of this character can not issue upon an interlocutory application.

3. That the equities of the bill are fully denied by the answer.

- I. The question whether Glauber is an indispensable party depends upon the further question whether he is materially interested in the matter in controversy or object of the suit, and that interest would be necessarily affected by any available decree consistent with the case presented by the bill.

It is undoubtedly a general rule in equity that all persons materially interested in the matter in controversy, or object of the suit, should be made parties in order that complete justice may be done and a multiplicity of suits be avoided. And usually when it appears that persons thus interested are not brought in, the court will order the case to stand over until they are made parties. A court of equity, as has been said by a distinguished chancellor, delights to do complete justice, and not by halves. But sometimes from the residence of parties thus interested, the court is unable to bring them all before it. Particularly is this so with the Circuit Court of the United States, which possesses no power to authorize a constructive service of process upon absent or non-resident defendants, and which can only exercise its jurisdiction in that class of cases depending upon the citizenship of the parties, where all the parties, however numerous on one side, are from a State different from that of the parties on the other side. In all such cases, the court will consider whether it is possible to

determine the controversy between the parties present, without affecting the interests of other persons not before the court, or by reserving their interests. If the interests of those present are severable from the interests of those absent, such determination can generally be had, and the court will proceed to a decree. But if the interests of those present and those absent are so interwoven with each other that no decree can possibly be made affecting the one without equally operating upon the other, then the absent persons are indispensable parties, without whom the court can not proceed, and, as a consequence, will refuse to entertain the suit: *Shields v. Barrow*, 17 How. 130; *Barney v. Baltimore City*, 6 Wallace, 280.

The inquiry then is this: whether Glauber possesses any interest in the controversy, or object of the suit, which is so interwoven with that of the other defendants, that no available decree consistent with the case presented by the bill can be rendered against them, which will not necessarily affect him. The suit is brought to prevent a diversion of water of which the complainant claims to be the owner by discovery and prior appropriation. The water, or, which amounts to the same thing, the exclusive use of it, is the matter in controversy, and the substantial object of the suit is to prevent any interference with such use by the defendants. Glauber, according to the allegation of the bill, is not interested in the water in controversy, but only in the tunnel by means of which the water is diverted.

Now if a decree can be rendered which will secure to the complainants the exclusive use of the water, and at the same time leave the right and interest of Glauber in the tunnel unimpaired, the objection founded upon his absence as a party defendant will not be tenable. The learned counsel of the defendants intimated on the arguments of the case, that should the court ultimately determine that the complainant is entitled to the water it might be necessary to decree that the tunnel be filled up. If only a decree of that character can be rendered to give protection to the complainants' rights, then undoubtedly Glauber is an indispensable party. But the complainants' counsel suggest several forms in which a decree may be made protecting the asserted rights of the complain-

ants without in any respect trenching upon Glauber's rights in the tunnel. The defendants might, for instance, be restrained from interfering with the water or performing acts to prevent the resumption by the complainants of its possession and use. It is stated that even if the defendants should not be decreed to do any specific act, such as the erection of a bulkhead, or the restoring of the water diverted, a decree would not be altogether fruitless which would allow the complainants to pump the water from the bed of the Nevada tunnel into its own tunnel, provided no counter work should be carried on in the Nevada tunnel to prevent such pumping; or allow the complainants to resume possession of the water at the mouth of the tunnel. A decree which would enjoin the defendants from opposing the complainants' resumption of the water in either of these modes, would substantially accomplish the objects of the suit, and at the same time leave the Nevada tunnel and the interests of Glauber therein as they existed previously.

It would certainly be going a great way, and not entirely consistent with proper respect for my associate, who is possessed in the circuit court with equal authority with myself, if I should undertake to determine, against his conclusions upon substantially the same representation of facts, without leave first granted for a re-argument of the question, that Glauber is an indispensable party, and thus decide in advance of the presentation of the entire case, that no decree could possibly be rendered which would afford protection to the complainant without infringing upon the rights of the absent Glauber. I shall leave the matter to his determination, simply observing that in a case of this kind, when the absent person alleged to be interested would, if brought into court, oust its jurisdiction, I should follow the course suggested by Mr. Justice STORY, in *West v. Randall*, 2 Mason, 196, and strain hard to give relief as between the parties before the court.

II. The injunction, although preventive in form, is undoubtedly mandatory in fact.

It was intended to be so by the circuit judge who granted it, and the objection which is now urged for its dissolution was presented to him, and was fully considered. I could not with propriety reconsider his decision, even if I differed from

him in opinion. The circuit judge possesses, as already stated, equal authority with myself in the circuit, and it would lead to unseemly conflicts if the rulings of one judge upon a question of law, should be disregarded, or be open to review by the other judge in the same case.

But were I not restrained by this consideration from interfering with the order of the circuit judge, I should hesitate before dissolving the injunction upon the ground stated. The benefit of the preventive remedy afforded by courts of equity in the process of injunction would often be defeated, if the remedy only extended to cases where obedience would not require any affirmative acts on the part of the party enjoined.

The owner of flumes, aqueducts, or reservoirs of water, might, for instance, flood his neighbor's fields by raising the sluice gates to these structures, and if the flowing should not be speedily stayed, might destroy the latter's crops; and yet, according to the argument of the learned counsel, no injunction could issue to restrain the owner from continuing the flood, if obedience to it should require him to do the simple affirmative act of closing his gates. The person whose fields were inundated and whose crops were destroyed, in the case supposed, would find poor satisfaction in being told that he must wait until final decree before any process could issue to compel the shutting of the gates, and he must seek compensation for the injuries his property may suffer in the meantime, in an action at law.

There is no species of property requiring more frequently for its protection and enjoyment the aid of a court of equity, and particularly of its preventive process of injunction, than rights to water. For purposes of mining as well as for ordinary consumption, water is carried, in the mining regions of Nevada and California, over the hills and along the mountains, for great distances, by means of canals and flumes and aqueducts constructed with vast labor and enormous expenditures of money. Whole communities depend for the successful prosecution of their mining labors upon the supply thus furnished; and it is not extravagant to say that much of the security and consequent value of this species of property is found in the ready and ample protection which courts of equity afford by their remedial processes of injunctions, anticipating

threatened invasions upon the property, restraining the continuance of an invasion when once made, and preserving the property in its condition of usefulness until the conflicting rights of contesting claimants can be considered and determined. The limitation of the process to cases calling for no affirmative action on the party enjoined would strip the process in a multitude of cases of much of its practical benefit.

I am aware that there are adjudications of tribunals of the highest character denying the authority of a court of equity, on a preliminary application, to issue an injunction, even in a restrictive form, when its obedience would require the performance of a substantive act.

Such is the case of *Audenried v. The Philadelphia & Reading Railroad Company*, recently decided in the Supreme Court of Pennsylvania, to which my attention has been called by the defendants' counsel (since reported in 68 Penn. State Rep. 370.) The opinion in that case was delivered by Judge SHARSWOOD, who is a jurist of national reputation, and anything which falls from him is justly entitled to great consideration.

He states that the authorities, both in England and in this country, are very clear that an interlocutory or preliminary injunction can not be mandatory. By this he means, I suppose, that the authorities show that such an injunction can not be mandatory in form, for he refers to the case of *Lane v. Newdigate*, 10 Vesey, 193, where Lord Eldon ordered an injunction to be drawn so that, although restrictive on its face, it compelled the defendants to do certain specific things. Of that case the learned judge observes that it is not a precedent which ought to be followed in any court, and that a tribunal which finds itself unable directly to decree a thing, ought never to attempt to accomplish it by indirection.

Notwithstanding the great respect I entertain for the opinions of Judge Sharswood, and for the decisions of the Supreme Court of Pennsylvania, I am not prepared to assent to the view of the authorities stated in the case cited, nor to the conclusion there expressed that the cases in England ought not to be followed in any instance.

Certain it is that the jurisdiction of the court of chancery in England to decree in special cases upon motion the issue of

injunctions, which, though restrictive in form, may still require for their obedience the performance of substantive acts, has been uniformly maintained since the time of Thurlow. In *Robinson v. Byron*, 1 Brown's Chancery Cases, 588, a motion was made for injunction upon affidavits, stating that since April 4, 1785, the defendant, who had large pieces of water in his park supplied by a stream which flowed to the mill of the plaintiff, had at one time stopped the water, and at another time let in the water in such quantities as to endanger the mill. The Lord Chancellor, Thurlow, ordered an injunction to restrain the defendant "from maintaining or using his shuttles, flood-gates, erections and other devices, so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before the fourth of April, 1785." The defendant was, therefore, compelled by this injunction to remove such flood-gates and other erections as he had constructed, if they impeded the regular flow of the water as it had existed before the date designated.

In *Lane v. Newdigate*, 10 Vesey, 192, already mentioned as referred to by Judge Sharswood, the plaintiff was assignee of a lease granted by the defendant for the purpose of erecting mills and other buildings, with covenants for the supply of water from canals and reservoirs on the defendant's estates, reserving to the defendant the right of using the water for his own collieries. The bill prayed generally that the defendant might be decreed to use and manage the waters of the canal so as not to injure the plaintiff in the occupation of his manufactory, but particularly that the defendant might be restrained from using certain locks, and thereby drawing off the water which would otherwise run to and supply the manufactory, and be decreed to restore a particular cut for carrying away the waste waters and a certain stop-gate, and to restore the banks of the canal to their former height, and also to repair such stop-gates, bridges, canals and towing-paths as existed previous to the lease, and to remove certain locks since made. Upon motion for an injunction, the Lord Chancellor, Eldon, expressed a doubt whether it was according to the practice of the court to decree repairs to be done, but finally made an order restraining the defendant from impeding the plaintiff in the use and enjoyment of the demised premises and the

mills erected thereon, and the privileges granted by the lease, by continuing to keep the canals, or the banks, gates, locks, or works out of repair; and from preventing such use and enjoyment by diverting the water or the use of any locks erected by the defendants, or by continuing the removal of the stop-gate, the chancellor observing at the same time that the injunction would create the necessity of restoring the stop-gate.

In *Rankin v. Huskisson*, 4 Simons, 13, the defendants were restrained on motion by Vice-Chancellor Shadwell from continuing the erection of stables on certain premises agreed to be laid out as an ornamental garden, adjoining a clubhouse, and from preventing such part of the building as was already erected from remaining thereon. They were therefore compelled to remove the building already commenced.

In *Hepburn v. Lordon*, 2 Hemming and Miller, 345, the defendants were restrained, upon motion by Vice-Chancellor Wood, from allowing inflammable damp jute deposited on premises adjoining those of the plaintiff, to remain there, and from bringing any more in such quantities as to occasion danger to the plaintiff's property.

Other cases to the same purport might be cited, but these are sufficient, I think, to show that a court of equity has jurisdiction to issue, upon an interlocutory application, an injunction which will operate to compel the defendants, in order to obey it, to do substantive acts. It is a jurisdiction which should only be exercised in a case where irreparable injury would follow from a neglect to do the acts required. Some of the adjudged cases evince a disposition on the part of the court to restrict rather than enlarge this jurisdiction. *Blakemore v. Glamorganshire Canal Company*, 1 Mylne and Keen, 154. Undoubtedly the general purpose of a temporary injunction is to preserve the property in controversy from waste or destruction or disturbance until the rights and equities of the contesting parties can be fully considered and determined. Usually this can be effected by restraining any interference with it; but in some cases the continuance of the injury, the commencement of which has induced the invocation of the authority of a court of equity, would lead to the waste and destruction of the property. It is just here where the special jurisdiction of

the court is needed, to restore the property to that condition in which it existed immediately preceding the commencement of the injury, so that it may be preserved until final decree.

III. It only remains to consider whether the equities of the bill are so fully denied by the answer as to justify the dissolution of the injunction.

The material allegations of the bill are that the complainant, in running certain tunnels into its mining claims, discovered and appropriated the water in controversy, and that the defendants subsequently, by means of the Nevada tunnel, struck the water, and diverted it from the complainant. These allegations are not positively denied by the answer.

The construction of the tunnels of the complainant and the diversion of the water by the defendants through the Nevada tunnel are admitted. The discovery and prior appropriation of the water by the complainant are only denied upon information and belief, and every denial which relates to the title of the water is made in a similar manner.

Denials in that form may be sufficient to raise an issue for trial, but they amount, for the purposes of the motion, to no more than hearsay evidence. They will not justify the dissolution of the injunction.

"The sole ground," says Mr. Justice Story, "upon which the defendants are entitled to a dissolution of an injunction upon an answer is, that the answer in effect disproves the case made by the bill, by the very evidence extracted from the conscience of the defendant, upon the interrogation and discovery sought by the plaintiff to establish it. But what sort of evidence can that be, which consists in the mere negation of knowledge by the party appealed to? Such negation affords no presumption against the plaintiff's claims, but merely establishes that the defendant has no personal knowledge to aid it or disprove it. It is upon this ground that it has been held, and in my judgment very properly held, that if the answer does not positively deny the material facts, or the denial is merely from information and belief, it furnishes no ground for an application to dissolve a special injunction." *Poor v. Carlton*, 3 Sumner, 78; see, also, *Roberts v. Anderson*, 2 Johns. Ch. 202; *Ward v. Van Bokkelen*, 1 Paige, 100; *United States v. Parrott*, 1 McAllister, 300.

The same objection applies to the allegations respecting the new matter relied upon to establish prior rights in the two Schiels, with whom the defendants claim to be in privity.

Upon inspection of the answer, it appears that all which is stated in relation to the origin, working, continuance and transfer to the defendants of the claims of these parties is founded upon information and belief.

The statement does not purport to be made upon any personal knowledge possessed by the defendants, but only "according to their information and belief." Allegations resting upon this foundation furnish no ground for disturbing the injunction. For all the purposes of this motion the case stands precisely as though these allegations were omitted from the answer.

The questions suggested by the learned counsel of the defendants—whether the water exists in such state or condition as to render its diversion under the circumstances, remediable, or anything more than *damnum absque injuria*; and whether the injunction is consistent with the policy and license of the general government to miners upon public lands—can be better considered and more justly determined on the hearing, after the entire facts of the case are developed by the evidence.

Upon the case as presented, I am of opinion that the injunction should be continued until the hearing. The motion to dissolve the injunction is therefore denied.

Motion denied.

HIGGINS V. BARKER ET AL.

(42 California, 233. Supreme Court, 1871.)

¹ **Diversion of water—First appropriator protected to extent of his original ditch.** The plaintiff constructed a ditch whereby he appropriated part of the waters of a stream. The defendants afterward appropriated the balance. Subsequently the plaintiff dug another ditch and diverted water thereby from the same stream. The plaintiff brought suit for an injunction restraining the defendants from interfering with plaintiff in the use of the water. At the trial the jury returned a special

¹ *Kidd v. Laird*, 4 M. R. 571; *Fabian v. Collins*, 5 M. R. 20.

verdict that the new ditch did not divert enough water to diminish the quantity appropriated by defendants. The court thereupon entered a judgment that the plaintiff is entitled to three hundred inches of water (the capacity of plaintiff's first ditch), and enjoined the defendants from disturbing the plaintiff in the use of that quantity. *Held*, that the judgment was entirely consistent with the verdict and with justice.

Appeal from the District Court of the First Judicial District, County of Santa Barbara.

The facts are stated in the opinion of the court.

J. FRANKLIN WILLIAMS, for appellants.

CHARLES E. HUSE, for respondent.

By the Court, CROCKETT, J.

The plaintiff alleges that in 1867 he constructed a ditch, whereby he appropriated, and thenceforth continued to use, for milling and other useful purposes, the waters of a certain creek flowing along the margin of his land; that afterward, and whilst he was so using the water, the defendants with force and violence tore down his dam, so as to prevent the flow of water in the ditch, and refuse to permit him to maintain the dam, threatening again to destroy it if he should rebuild it; that the defendants are unable to respond in damages, and that the injury which he would suffer if the dam is abated would be irreparable. The prayer is for damages, and for an injunction restraining the defendants from interfering with plaintiff in the use of the water.

The answer, after denying most of the material averments of the complaint, sets up new matter, to the effect that the first ditch constructed by the plaintiff was a small ditch, carrying only a part of the water of the creek, leaving a surplus, which the defendants appropriated for domestic purposes and irrigation; that after they had so appropriated the surplus water the plaintiff constructed a new ditch of larger capacity, which carried off and diverted all the water of the creek from its natural bed, and entirely cut off that portion

of the water which the defendants had appropriated. As affirmative relief, they pray for damages against the plaintiff.

At the trial a jury was impaneled, to whom special issues were submitted, and who found, in effect, that the construction of plaintiff's ditch in 1867 was an appropriation of the waters of the creek to the extent of the capacity of the ditch, which was sufficient to carry the greater portion, but not all the water of the creek; that the plaintiff, therefore, did not appropriate *all* the water of the creek; that in the spring or summer of 1870 the plaintiff built a new dam or ditch, which diverted a portion of the water of the creek, but not enough to diminish the quantity appropriated by the defendants. The court entered a judgment fixing the quantity of water to which the plaintiff is entitled at three hundred inches, which it finds to have been the capacity of the plaintiff's first ditch, and enjoining the defendants from disturbing the plaintiff in the use and enjoyment of that quantity of water. But no damages were awarded either to the plaintiff or defendants. From this judgment the defendants appeal on the judgment roll alone, and insist that on the facts found by the jury the injunction ought to have been dissolved and the complaint dismissed. But I discover no error in the record. The plaintiff first appropriated all the water which his original ditch would carry, which the court finds was three hundred inches; and the defendants afterward appropriated the whole or a portion of the surplus. Subsequently the plaintiff constructed a new dam or ditch; but the judgment limits the quantity of water to be diverted by the plaintiff to three hundred inches, which is the amount originally appropriated, and leaves all the surplus for the use of the defendants. The judgment appears to me to be entirely consistent with the verdict and with justice, so far as the facts are disclosed in the record.

Judgment affirmed.

THE WEST POINT IRON COMPANY, Respondent, v.
REYMERT ET AL., Appellants.

(45 New York, 703. Court of Appeals, 1871.)

¹ Irreparable injury—Multiplicity of suits. Mines, quarries and timber are protected by injunction, upon the ground that injuries to and depredations upon them are, or may cause, irreparable damage, and also with a view to prevent a multiplicity of actions for damages that might accrue from a continuous violation of the rights of the owners.

No suit essential where title clear. It is not necessary that plaintiff's right should first be established in an action at law, the evidence in the case for the injunction showing a clear title in the plaintiff, and only a sham title set up by the trespassing defendant.

Waiving place and mode of trial. A defendant who is entitled to a trial in a certain county by a jury waives these rights by submitting to a trial by the court in a different county.

Form of acknowledgment. The persons who acknowledged the execution of a grant were by the commissioner certified "to be the persons who executed the" deed: *Held*, that the certificate was a substantial compliance with the act under which it was taken.

² Reservation may operate as exception. A reservation in a deed will not give title to a stranger, but it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or reserved.

Appeal from an order of the General Term of the Supreme Court, in the Second District, affirming a judgment for the plaintiff, on a trial by the court without a jury.

The place of trial named in the complaint is Putnam county; the trial was had at Poughkeepsie, without any order for the change of the place of trial, but without objection at the trial.

The plaintiff claimed to be the owner of an iron mine, known as the "Pratt Iron Mine," in Putnam county. The defendants deny the plaintiff's title to the mine, and claim under a mining lease granted to them by Benjamin Forman, the surface proprietor of the farm upon which the mine is located. This action is for an injunction and damages. The question on the trial was upon the plaintiff's title to the mine. The plaintiff proved title by a possession and claim of ownership

¹ *Nichols v. Jones*, 19 Fed. 855.

² *Sloan v. Laurence Furnace*, 5 M. R. 659.

in one Abijah Pratt, Sr., his heirs, and their grantees down to the plaintiff, for a period of at least fifty years; also by a chain of paper title, commencing with a deed from John Bailey to William W. Pratt, dated November 24, 1827, and ending in a deed to the plaintiff. The officer taking the acknowledgment of this Bailey deed certified "came before me" the grantors, "known to me to be the persons who executed the within deed," etc., January 14, 1828. Also, by producing the deeds under which Benjamin Forman (the lessor of the defendants) derives his title, in which deeds was a clause "reserving the right to William W. Pratt to a vein of ore now wrought by him on the premises."

The defendants claim that they had expended money in good faith in developing the mine, in ignorance of plaintiff's title, and claimed the right to be reimbursed for such outlay. To answer this the plaintiff proved actual notice to the defendants before they made the outlay, and that when Forman executed the lease to defendants he told them he did not own the Pratt mine, and had never owned it.

The court found and decided in favor of the plaintiff, and granted the injunction prayed for.

GEORGE W. STEVENS, for the appellants.

AMASA J. PARKER, and E. A. BREWSTER, for the respondent.

ALLEN, J.

The action was tried in the county of Dutchess, and by the court without a jury, without objection on the part of the defendants. If the trial should have been in Putnam, and by a jury, it was for the defendants to assert their rights at the trial; and by not then claiming them, they waived them, and must be regarded as having assented to the place and mode of trial.

It was a proper case for relief by injunction if the plaintiff's right to the mine was established, and it was not necessary that the right should be first established in an action at law. The injury complained of was not a mere fugitive and tem-

porary trespass, for which adequate compensation could be obtained in an action at law, but was an injury to the corpus of the estate.

Mines, quarries and timber are protected by injunction, upon the ground that injuries to and depredations upon them are, or may cause, irreparable damage, and also with a view to prevent a multiplicity of actions for damages that might accrue from a continuous violation of the rights of the owners: *Livingston v. Livingston*, 6 Johns. Ch. 497; *Thomas v. Oakley*, 18 Vesey, 184; Story's Eq. Juris., § 929 *et seq.* Equity will interpose by injunction to prevent an encroachment upon the rights of a proprietor in a running stream, and will exercise jurisdiction to compel a restoration of running water to its natural channel: *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191. The certificate of acknowledgment of the grant from Bailey and wife to William W. Pratt was sufficient in form, the commissioner by whom the same was taken certifying that the persons acknowledging the execution were known to him "to be the persons who executed the" deed: *Jackson v. Gumaer*, 2 Cow. 552; *Troup v. Haight*, Hopk. 239; *Hunt v. Johnson*, 19 N. Y. 280. The certificate was a substantial compliance with the act under which it was taken: 1 R. L. 369, §§ 1, 2; and as it is only *prima facie* evidence of the facts stated, and may be contradicted, and is in one of the forms very generally followed, it ought not to be rejected for want of a literal adoption of the very words of the statute. The plaintiff made a *prima facie* title to the mine, and showed the use and occupation of it by those from whom title was derived for a long series of years. The earliest recognition of the plaintiff's title was in a deed, under which the defendant's lessor derived his title from Thomas D. Denny and wife to John and James Bailey, bearing date August 27, 1824, conveying the tract of land within which the mine is situated, and "excepting an ore bed conveyed to Abijah Pratt by Richard D. Denny on the premises hereby conveyed." How Richard D. Denny had or acquired title to the ore bed does not appear, but evidence was given that for a period of fifty years it had been known and called the "Pratt Iron Mine." Abijah Pratt was the ancestor of William W. Pratt, who, upon his death, succeeded to the occupation of the mine, and to whom John Bailey, who had acquired the right of his co-grantee, James

Bailey, in 1828, granted the ore bed or mine in perpetuity. This grant was probably made to supply the place of that to Abijah Pratt, which had been lost.

The plaintiff's title was derived from successory grants from William W. Pratt. The only evidence of title in the defendants was a lease from Benjamin Forman, dated August 25, 1866, for the term of fifty years. The several grants under which plaintiff claims were recorded in the proper office and books; and the judge finds that the several owners, respectively, were in possession of the mine during those respective ownerships, and that the defendants, at the time they took their lease, had actual notice that the lessor did not claim and had no right to the mine. Forman derived title to the *locus in quo* under and through the Baileys, who took title under the deed from Thomas D. Denny, and all the deeds in the chain of title down to and including that to Forman, contained a clause recognizing the right of William W. Pratt to the mine by "reserving to William W. Pratt the right he has to the ore bed and the right of way to the West Point foundry, as now used," or in similar and substantially the same words. A reservation in a deed will not give title to a stranger, but it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or "reserved." The plaintiff's title is independent of the reservation, which is only important here as evidence of the extent of the grant to the defendants' lessor, and of notice to all claiming under the grant of the existence of a title to the ore bed in others. It is true that evidence was given that in 1868, and after the commencement of this action, Forman obtained a deed of the premises from the heirs at law of Richard D. Denny, but there was no evidence that Richard D. Denny ever had any title other than that which he granted to Abijah Pratt prior to 1824, or that he was ever in possession of the premises, nor was there proof of any fact tending to show that the pretended grantor had any title or estate to convey. The plaintiff's title was abundantly established. That set up by the defendants was sham. The judgment was in all respects right, and should be affirmed.

All concur.

Judgment affirmed.

LOCKWOOD ET AL., Defendants in Error, v. LUNSFORD,
Plaintiff in Error.

(56 Missouri, 68. Supreme Court, 1874.)

¹ **No perpetual injunction before title settled.** Equity will not usually grant a perpetual injunction where the title is put in issue and where the evidence leaves the title still in doubt, but will grant a temporary writ till the title is settled at law; but upon the facts in this case, it was *held*, that the title was not really in issue, and the perpetual injunction was upheld.

Injunction against trespasser—Insolvency. Where a mere trespasser digs into and works a mine to the injury of an owner, an injunction will be granted, and especially where such trespasser is insolvent.

Licensee after revocation is a trespasser. One engaged in mining under a revocable license which license has been revoked, becomes a mere trespasser if he continues to mine after the revocation.

Error to Madison Circuit Court.

The opinion states the facts.

W. N. NOLLE and M. L. CLARDY, for plaintiff in error.

B. BENSON CAHOON and JOHN F. BUSH, for defendants in error.

VORIES, Judge, delivered the opinion of the court.

This was a petition for an injunction, filed by the plaintiffs against the defendant, for the purpose of restraining the defendant from wrongfully digging and removing certain minerals from the lands claimed to belong to the plaintiffs.

It is charged by the petition that the plaintiffs are the owners and proprietors of a confirmation grant and tract of land, lying partly in the county of Madison and partly in the county of St. Francois, State of Missouri, and known as Mine La Motte; that the grantors under whom plaintiffs claim title have had the uninterrupted possession of said land for more than twenty consecutive years; that before and since plaintiffs have come into the possession of said tract of land, the defendant has unlawfully and forcibly had and occupied a small lot of

¹ *West Point Co. v. Reymert*, 7 M. R. 528; *Old Telegraph Co. v. Central Co.*, 7 M. R. 555; *Stevens v. Williams*, 5 M. R. 449.

ground, about forty feet square, being a part of said tract of land (which lot is described in the petition), known as the "Lunsford Shaft" or "Sulphur Lead;" that said lot of ground is mining or mineral land, the chief and sole value of which consists in the lead ore, and other mineral deposits which said ground contains; that the Mine La Motte claim or confirmation, of which said lot forms a part, is a large body of land containing extensive deposits of lead and other ores, on which said tract of land mining for said minerals or ores is carried on under the authority and directions of plaintiffs; that the defendant has no title, either in law or equity, to the said lot or parcel of mineral land, nor has he any right to the possession thereof; that long before the purchase of said Mine La Motte by plaintiffs, certain rules and regulations were established by the former owners of said tract, for the purpose of mining in and on the same, the tenor of which was that parties desiring to work as miners thereon were required to register their names, as miners, in a book to be kept by said owners of said land for that purpose; that after said miners' names were registered, they were permitted to go on said tract and stake off a lot of land forty feet square, the description of which was to be registered, when permission was given them to work the same, upon condition that they should deposit with the smelters of ore on said tract, one tenth of the mineral mined, for the benefit of the owners of said tract of land; that among said rules and conditions there was one by which said miners were compelled to work the ground selected by them, and upon their ceasing to work the same for ten consecutive days, then the license or permit given them was to cease and their claim to be wholly forfeited.

The petition alleged that the license or interest of the miners under said rules were liable to be revoked or terminated at any time that the owners saw fit, all of which terms and conditions were well known to the miners; that when notice was given to defendant by R. F. Fleming, as hereinafter to be stated, similar notices were given by the same person to all other miners working on said tract, under said rules, at the same time with the defendant, and that upon receiving said notice all such persons, except defendant, delivered to said owners peaceable possession of their said lots of mineral lands so worked out by them; that neither plaintiffs

nor those under whom they claim have ever leased said premises or lot of mineral land to defendant, and the only right he ever had in or to said premises was a parol license or permission given him by the former owners of said Mine La Motte tract, to dig for ore in the manner and under the rules aforesaid; that the said lot is unlawfully and forcibly in the possession of defendant; that plaintiffs have not since, or before they became the owners of said Mine La Motte tract, in any manner given the defendant, or any other persons, any license or permission to occupy, work or mine in or on said shaft or lead known as the "Lunsford Shaft," or any other part of said tract of land; that previous to the purchase of said Mine La Motte tract of Robert F. Fleming and others by plaintiffs, due notice in writing was given to defendant by said Fleming, for himself and others, owners, demanding that he deliver the immediate possession of all mineral grounds worked by him as aforesaid, and the appurtenances, to the said owners thereof; that subsequent to this notice, on the 6th day of September, 1861, plaintiffs demanded in writing, of defendant, the possession of said lot before worked by him; that he refused to deliver or quit the possession or occupation thereof, either to said Fleming or to plaintiffs; that immediately after said notice by said Fleming, defendant ceased mining operations in said "Lunsford Shaft," but forcibly deprived plaintiffs of the possession thereof, and subsequently unlawfully commenced to work and mine the same, and now continues to work the same.

The plaintiffs then further charge that said plaintiff, Lockwood, commenced an action of unlawful detainer against the defendant, before a justice of the peace, and that he regularly prosecuted said action to final judgment, and recovered a judgment against defendant for the possession of said lot and premises, and costs; that a writ of restitution was duly issued on said judgment, and placed in the hands of the proper sheriff to be executed; that said officer refused to execute the writ, and returned the same unexecuted on the 14th day of October, 1869; that on the 18th day of October, 1869, defendant, and other persons whose names are unknown, and who were acting for, and in concert with the defendant, unlawfully and forcibly, and against the will of plaintiffs, commenced to mine in and remove ore from said sulphur lead,

and are still continuing so to do; that plaintiffs at said time had and still have the exclusive right to said premises, and to the possession thereof, which was well known to defendant; that said defendant, and others working under him, intended to and will, unless restrained by the order of this court, extract from and carry away all of the valuable mineral from said "Lunsford Shaft" or "Sulphur Lead," as aforesaid; that said mineral is of great value, and the land is almost valueless except for the mineral; that defendant is wholly insolvent, so that a judgment at law would be unavailing, and that great and irreparable injury will be done unless the defendant is restrained therefrom. An injunction is therefore prayed, and a prayer for general relief. A temporary injunction was issued by the judge of the court in vacation, and a writ issued returnable to the next term of the court, at which time the defendant appeared and answered the petition.

The answer denies that plaintiffs are the sole owners of the Mine La Motte tract or lot in question, and charges that the deed by which plaintiffs derive their title to an undivided part of the lot is void, and the answer puts in issue the whole facts of the petition. The answer then sets up a claim to, and right to occupy, said mine, and dig ore from the said "Lunsford Shaft" as aforesaid, by virtue of a license or lease from the former owners of said Mine La Motte tract, and under rules and regulations promulgated by them, and that by virtue of said license and rules he had a right to take the ore from said mine, etc.

Plaintiffs filed a replication denying all affirmative matters in the answer.

After the issues were thus framed, the defendant filed a motion to dissolve the injunction before granted. This motion assigns a great many reasons for the dissolution of the injunction, amongst which it is stated that the petition does not state facts sufficient to entitle plaintiffs to the relief prayed; that they have a remedy at law, and that the facts set up in the answer amount to a full defense to the action, etc.

The cause was afterward taken up, and by the parties submitted to the court for hearing upon the issue joined. The court, after hearing the evidence, found the facts for the plaintiffs, and rendered a decree perpetually enjoining defendant from taking ore from the mine in question, etc.

The defendant filed a motion for a new trial, and in arrest of judgment, which being severally overruled, he excepted, and has brought the case to this court by writ of error.

The record in this case is a long one, and abounds in objections and exceptions, made by the different parties, to various rulings of the court made during the trial of the cause, most of which related to matters not really material to the rights of the parties. It will therefore only be necessary to notice those objections raised in this court, which go to the merits or the right of action or defense.

The plaintiffs, on the trial, after having offered evidence tending to prove possession of the land in those under whom they claimed for more than twenty years, offered in evidence a deed from John A. Weber, Francis L. Valle and John Betton, to John H. Fry, for an undivided part of the title to the tract of land known as Mine La Motte, the deed being dated October 28, 1868. This deed was objected to on the ground that its tendency was to prove title to the premises in the plaintiffs, which fact, it was contended by the defendant, could only be tried by a jury. The plaintiffs also offered in evidence a deed from the said Fry to plaintiffs for the same land, dated March 6, 1869. This deed was also objected to by the defendant on the same ground stated, to the deed from Weber and others to Fry. This objection was overruled by the court and this action of the court, it is insisted by the defendant, was erroneous.

In this case the trial of the issues involved in the case was submitted by the parties to the court, and in fact it is a case that must have been tried by the court, the court having the right under the statute to take the opinion of a jury upon any specific question of fact involved: 2 Wag. Stat., 1041, § 13. But the court was not bound to submit any such question of fact to a jury. It is very true that courts of equity will not usually grant a perpetual injunction in cases where the title to the premises is put in question, and where from the evidence in the case, the title appears to be in doubt, but will in such cases only make a temporary injunction to restrain the parties until the title can be settled at law: *Eckkamp v. Schrader*, 45 Mo. 505; *Storm v. Mann*, 4 John. Ch. 21. This objection does not, however, apply as to the admissibility of the evidence, but it is a matter for the consid-

eration of the chancellor upon the final determination of the case: *Hicks v. Michael*, 15 Cal. 107. It may as well be stated here that, from the evidence in the case and the defense set up and relied on by the defendant, he does not claim an adverse title to the title of the plaintiffs, but he only claims a license to work a mine from the grantors of plaintiffs, who were always in possession of the land for at least twenty years, until they delivered the possession to the plaintiffs. So that upon the whole case there seems to be no real question as to the title, although the answer denies that the plaintiffs are the sole owners of the land. The real question in the case was as to the defendant's right under a license from the owners to work the mines and extract the ores. The deeds were therefore properly admitted in evidence.

The plaintiffs next offered in evidence a deed from R. F. Fleming, administrator with the will annexed of Thomas Fleming, deceased, to R. B. Lockwood, dated July 18, 1869; also, a deed from Robert F. Fleming, as executor of Thomas F. Fleming, deceased, to P. B. Lockwood, dated July 8, 1869, for the same lands or undivided interest therein. Also, a deed from R. F. Fleming for himself and as executor of the will of Thomas Fleming, deceased, to R. B. Lockwood for the same lands. Each and all of these deeds were objected to because the plaintiffs had failed to show any authority in the executors and administrators named therein to convey. The objection being overruled, the defendant excepted.

Plaintiffs then offered in evidence a deed from R. F. Fleming, C. F. Fleming and thirteen others, purporting to be the widow, heirs and representatives of Thomas Fleming, deceased, of Philadelphia, and of Thomas Fleming, late of Madison county, Mo., to R. B. Lockwood, dated October 20, 1869. This deed refers to the three last deeds given in evidence, and confirms each of said deeds in express terms and conveys by quitclaim the right, title and interest of such heirs to the grantee in said deeds. This last deed was objected to on the same ground for which the three last deeds were objected to and on the ground that it was not shown that the parties were the heirs of Fleming, as they were represented. The plaintiffs also proved that part of the grantors were the real heirs and representatives of Thomas Fleming, deceased. And

the defendant admitted that the title to Mine La Motte tract of land was originally in the said Thomas Fleming, and in Weber, Valle and Betton. The court properly overruled the objection to all and each of the four last named deeds. The three first, by the provisions of the last, were adopted by the last deed and made a part of it, and were admissible in evidence as a part of the deed of confirmation of the heirs of Thomas Fleming, deceased, and part of the grantors in said deed were proved to be the proper children and heirs of Thomas Fleming, deceased, who, it is admitted by the defendant, was a part owner of the land named. These admissions of the defendant are conclusive as to the title being in the grantees of Fleming's heirs, and the deeds were therefore material and properly admitted in evidence.

It should be stated that by these deeds the land was conveyed to Lockwood for the use of himself and Scott. The plaintiffs also offered in evidence the transcript of the proceedings had before a justice of the peace, in which Lockwood was plaintiff, and defendant in this case was the defendant. The action was an action of unlawful detainer, in which the plaintiffs had recovered a judgment for the premises named in the petition, etc. This transcript was objected to on several grounds, but the objections were overruled, and the defendant excepted. It is only necessary to say in reference to this transcript, that as I view this case, it was not material to the plaintiffs' right of recovery, and could do neither good to the plaintiffs nor harm to the defendant, as the other facts in the case are found by the court. The judgment would be just the same without this evidence as with it.

The plaintiffs also introduced evidence tending to prove that they had received the possession of the Mine La Motte tract of land, from Valle, Weber and Betton, in part, and from Fleming's heirs in part; that they received the possession in March, 1869.

The evidence of the plaintiffs was sufficient to prove all of the main facts stated in the petition. This is not seriously disputed. But the defendant contends that the plaintiffs could not have a perpetual injunction in this case, because they had a remedy at law, and that the facts are not sufficient to authorize any equitable relief. The facts of the case show

that the defendant was engaged in unlawfully, against the will of plaintiffs, extracting and removing the ore from a valuable mine belonging to the plaintiffs; that the land was only valuable for the minerals which were being removed; that defendant threatened to continue his work of extracting the mineral from said land, to the great damage and destruction thereof; that defendant was wholly insolvent, so that a judgment at law would be unavailing.

It has for a long time been settled, that where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted, and more particularly so where the trespasser is insolvent, so that an action at law could not avail: 2 Sto. Eq. § 929; *More v. Masini*, 32 Cal. 590; *Thomas v. Oakley*, 18 Vesey, 184; *Merced Mining Company v. Fremont*, 7 Cal. 317.

The defendant set up a defense to this action, that he held the mine out of which he was removing the mineral by virtue of a lease or license from the grantors of the plaintiffs to him, and that he was not, therefore, unlawfully removing said mineral from said mine. The whole question as to the defendant's rights under the evidence in the case, was fully considered and passed on by this court in the case of ¹*Lunsford v. The La Motte Lead Company*, 54 Mo. 426. The facts in that case in reference to the defendant's rights as a miner, and the facts in this case, are identical in all of their material features. The same rules, regulations, etc., were relied on in each case. In that case we held, that under the evidence the defendant was a mere trespasser in working the mines. We do not propose to re-investigate this whole matter, but simply content ourselves by referring to the opinion in that case. We suppose that the real merits of this case were really settled by that case, except as to a question of costs.

There seems to be no substantial error in the case. The judgment will, therefore, be affirmed. Judge WAGNER absent. The other judges concur.

¹ *Post* LICENSE.

MAGNET MINING COMPANY, Respondent, v. PAGE AND
PANACA SILVER MINING COMPANY, Appellant.

(9 Nevada, 346. Supreme Court, 1874.)

¹ **Effect of answer denying the equities of the bill.** Where the answer to a bill to restrain the working of a mine, fully and fairly denies both the title and possession of complainant, no testimony being taken, and the case standing on the pleadings alone, the injunction should be dissolved until good reason appears for continuing it. The ordinary case of alleged taking of ore out of a mine claimed by complainant is no exception to this rule.

Denial by answer taken as true. A complete denial by the answer is taken as true upon a motion to dissolve an injunction when heard upon bill and answer alone.

Appeal from the District Court of the Seventh Judicial District, Lincoln County.

The plaintiff claimed to be the owner and in possession of the quartz ledge known as the Panaca, on Panaca Flat, Ely Mining District, Lincoln county, and that defendant, on April 16, 1874, entered upon a portion of the same, and ejected plaintiff therefrom to its damage in the sum of thirty thousand dollars. The complaint also set forth that defendant had extracted from the mine valuable ores, and threatened to continue the extraction and removal of ores, and prayed for damages, an injunction and other relief. Upon this complaint, which was filed June 1, 1874, the district judge ordered the application for an injunction to be heard on June 12, 1874, and in the meanwhile issued a restraining order to "remain in full force and effect until the 12th day of June A. D. 1874, at 10 o'clock, A. M., of that day, and until further order herein."

The defendant filed its answer on June 10th, denying fully all the material allegations of the complaint. Several stipulations were afterward made continuing the time for hearing the application for an injunction, but it seems that application never came up. On July 7th, defendant moved to dissolve the restraining order, and on July 10th, that order

¹ *Lady Bryan Co. v. Lady Bryan Co.*, 7 M. R. 478.

MAGNET M. CO. v. PAGE AND PANACA M. CO. 541

was modified "so as to allow the defendant to continue the working of the ground in controversy, and described in the foregoing order, and to raise the ore to the surface or dump, and then deposit the same upon the dump, but not to remove the ore from the dump or from the vicinity of the shaft, incline or dump of defendant's works." On July 16th, an order was entered denying the motion to dissolve the restraining order, and continuing that order, as modified, in force pending the action.

From these orders defendant appealed.

A. B. HUNT and HENRY RIVES, for appellant.

GARBER, THORNTON & KELLEY, for respondent.

By the Court, BELKNAP, J.

Upon the filing of the complaint in this case an application was made for an injunction restraining the defendant from extracting or removing ore from certain described mining ground of which the plaintiff claims to be possessed in fee. An order was made fixing the time for the hearing of the application for the injunction, and in the mean time the defendant was restrained from the commission of the acts complained of.

The hearing of the application was continued several times by stipulation, and, for some cause unexplained by the record, was not heard upon the day finally set for hearing. The merits were reached by motion to dissolve the restraining order. It was then modified so as to restrain defendant from removing ore from the premises in controversy.

The answer fully and fairly denies plaintiff's alleged title and possession, and no testimony was offered upon either of these points. The questions of title and possession, therefore, stand upon the pleadings. A complete denial by the answer is taken as true, and, in the absence of testimony establishing the material allegations of the complaint, the injunction should be dissolved, unless good reasons appear for continuing it. So in New York an injunction was retained where it could work no injury, while to dissolve it might do

so, notwithstanding a full denial of the equities of the bill: *Bank of Monroe v. Schermerhorn*, Clark's Ch. 303. And where the statement of the defendant was extremely improbable: *Moore v. Hylton*, 1 Dev. Eq. 429. And where the denial was grounded upon information and belief: *Poor v. Carleton*, 3 Sum. 70.

But no reasons appear to make this an exceptive case. The denials of the answer must be taken as true, and so taken the plaintiff has no ground for equitable relief.

The order appealed from is reversed, and the injunction dissolved.

Reversed.

LAWRENCE AND OTHERS' APPEAL.

(78 Pennsylvania State, 325. Supreme Court, 1875.)

¹ Acquiescence in location of railroad—Lessee mining under roadbed.—

A railroad was constructed over certain lands without legal proceedings to condemn it, but without objection from the owners. Afterward proceedings to assess damages were commenced, but compromised and released. After the road was built, but before the release, coal veins undercropping the roadbed were let by the owner of the land. *Held*, that the title of the railroad company was by the original occupation without objection; that the release did not operate as an original conveyance, but as a discharge of the damages for the entry and occupation; and that the lessee of the coal took his lease subject to the right of way, and the coal company were enjoined from mining under the road.

Appeal from the Court of Common Pleas of Schuylkill County. In Equity. Of January Term, 1874.

The bill in this case was filed May 9, 1872, by the Philadelphia and Reading Railroad Company against Jacob S. Lawrence and others, partners as Lawrence, Merkle & Co., lessees, and divers other persons, owners of the land referred to in the bill.

The bill set forth that the Mahanoy and Broad Mountain Railroad Company, chartered under the general railroad law

¹ Grantee must take notice of visible easements: *Oregon Co. v. Trullenger*, 4 M. R. 247.

of February 19, 1849, completed their railroad in the year 1860, including an inclined plane known as the "Mahanoy Plane," extending from the top of Broad mountain 2,800 feet down the slope of the mountain to its foot; the plane was constructed at great expense, and was the main outlet to market of the coal in Mahanoy valley, more than 1,000,000 tons of coal per year being carried over it to market; that it was located on land of William Rohrer and others named in the bill as owners, and that the land was partly underlaid by certain veins of coal, one of which was the Mammoth vein, whose outcrop crossed under the plane; that the company acquired the right over the land for the plane under proceedings commenced in the Court of Common Pleas of Schuylkill county to December term, 1862, and release dated November 2, 1868; that under certain acts of assembly named in the bill, the last of which was approved February 18, 1871, all the rights of this and other companies theretofore consolidated, became vested in the plaintiffs; that after the entry of the plaintiffs on the land occupied by the plane, Lawrence, Merkle & Company leased the Mammoth vein, including that part underlying the plane, and erected the Lawrence colliery; that said firm were mining coal in said vein lying under and keeping up the plane, in places specified in the bill, and should it be mined out, the plane would be thrown down, the plaintiffs prevented from using it, and the region depending upon it be deprived of an outlet for its coal; that they had notified the firm to cease; they paid no attention to the notice, but continued to mine coal, and threatened to open other breasts, mine coal from them, and to undermine, let down and destroy the plane.

The prayers were to restrain the firm from mining, etc., any coal in the places mentioned in the bill, or interfering with the breasts or with any of the Mammoth vein coal, etc., where their gangway would pass under the plane, and for general relief.

Affidavits were filed and a special injunction was awarded.

Lawrence, Merkle & Co., answered, admitting many of the averments, amongst others, that the Mahanoy and Broad Mountain Company in 1860, as averred in the bill, completed the Mahanoy plane, which was one of the main outlets for coal mined

in the Mahanoy valley, and that it was over lands of William Rohrer and others, as stated in the bill. They denied that the company acquired the right of way under proceedings in the Court of Common Pleas of Schuylkill county, or that they acquired any title to the right of way against the possession of the respondents by virtue of the release of November 2, 1868, and averred that such possession and its extent were known to the railroad company; that on the 1st of January, 1868, the owners of the land over which the plane was located, leased to Lawrence, Merkle & Co., for fifteen years, the exclusive right to dig, etc., coal, and the exclusive possession of a body of land, which includes the part on which the Mahanoy plane is located, and they immediately took possession of the leased premises, commenced to open the Mammoth vein, erect improvements, etc., of which the Mahanoy and Broad Mountain Company had notice before they took the release. The respondents admitted that they took possession of the demised premises after the occupation of part of them by the Mahanoy and Broad Mountain Company for their plane, but denied that their occupation was unlawful, and they averred that there was no reservation in the demise to the respondents of any part of the land within the boundaries of the demised premises; they admitted that they were mining and driving a gangway toward the plane, with the intention of taking away all the coal except that immediately under the roadway of the plane, and claiming the right to mine, etc., all the coal in the Mammoth vein.

A replication was filed and an examiner appointed, who took testimony, but no master was appointed. Proceedings were commenced on the 17th of November, 1862, to have damages assessed for the owners of the land by reason of its occupancy for the railroad; the viewers appointed reported, February 3, 1863, that they had assessed the damages at \$570, but inasmuch as there was dispute about the ownership of the land, they were unable to report to whom the damages were to be paid, but suggested that they be paid into court to await the determination of the question of the title.

On the 2d of March, 1863, John Gilbert and others of the owners appealed. On the 18th of January, 1869, it appearing to the court that the title to the land had been finally

settled in favor of Gilbert and others, and that none of the other parties, defendants, had any claim to the land or the award of \$570, the court ordered that the proceedings to assess damages should be discontinued, and satisfaction entered on the award of the viewers, upon said parties filing an agreement to that effect; the agreement was filed and satisfaction entered the same day.

The release referred to in the bill recited that the Mahanoy and Broad Mountain Railroad Co. had fixed, etc., the route for their main line, the Mahanoy city branch, etc., to the colliery of Lawrence, Merkle & Co., through and upon lands of John Gilbert and others, naming them, and occupied or intended to occupy for the main line, land thirty feet wide on each side of the center line of their road, etc., and in consideration of the advantage to be derived to them from the location and construction of the road, Gilbert and others, the owners of the land, released the railroad company from all claims, damages, etc., by reason of their entering upon and taking the land and the location and construction of their railroad, and covenanted that no non-user of the land appropriated and no occupation by the releasors by residence or otherwise for any period of time should affect the right of the railroad company to the entire and exclusive possession of the same.

The other testimony related principally to the questions of the mining of respondents with reference to the railroad, and the danger to it by continuing the mining.

The court (WALKER, A. J.) on the 5th of January, 1874, decreed that the defendants be perpetually restrained from mining, taking out, or in any manner interfering with the coal now remaining in the top breasts laid down in a draft, etc., being under the plane, beginning, etc.

The defendants appealed to the Supreme Court and assigned the decree for error.

L. BARTHOLOMEW and E. O. PARRY, (with whom was C. N. BUMM) for appellants.

J. ELLIS and J. E. GOWEN, for appellees.

PER CURIAM.

We find no error in this decree. The railroad company had actually appropriated the land, and built and used its railway long before any title by lease of the coal mines had vested in the defendants. This is admitted in the answer. The owner of the land made no objection to this appropriation, but after a proceeding to assess the damages had been prosecuted, finally compromised and released. The title of the railroad company came not through this proceeding, but by its original entry and appropriation without objection. The release operated not by way of an original conveyance, but by way of a discharge for the damages incurred by the entry and construction of the railway. It is clear, therefore, that when the defendants obtained their lease they took it subject to the previous easement and right of way of the railroad company over the surface. The railroad was then in lawful existence and use. The owners made no defense to the right of the railroad company to appropriate the land, and their tenants can not now set up a defense which they waived, if they had any. The act of 1849 does not compel a railroad company to remove its track, though it gives the authority. A most necessary provision for the security of the company and of the public. To hold the law to be mandatory would result in its being compelled to shift the location, involving perhaps an extensive change of gradients, as often as the mine owner honeycombs the earth beneath the railway.

Decree affirmed with costs and appeal dismissed.

 LEITHAM ET AL. V. CUSICK ET AL.

(1 Utah, 242. Supreme Court, 1875.)

¹ **Order without notice vacated.** An injunction granted at chambers without notice may be dissolved without notice.

² **Irreparable injury, how pleaded.** Where, upon an application for an injunction to restrain the defendants from working certain mining ground,

¹ See *Golden Gate Co. v. Superior Court*, 2 West C. R. 736.

² *Thorn v. Sweeney*, 7 M. R. 564.

and from selling any ores therefrom, the plaintiffs alleged that the injury was irreparable, from the fact that it was impossible for them to know the amount and value of the ores taken from the mine by defendant: *Held*, that the simple statement of the complaint to that effect is not sufficient, but the facts should be stated from which the court could learn that the injury was irreparable.

Restraining order governed by the complaint. A restraining order that goes further than the prayer of the complaint is improper, and should be set aside.

¹**Practice on motion to be restored to possession.** When the defendants have been deprived of the possession of mining ground by an officer acting under a restraining order, which was improperly issued, the judge who granted the same can not, upon application of the defendants without notice, restore them to the possession.

Appeal from the First District Court.

The facts appear in the opinion.

O. F. STRICKLAND, for appellants, Leitham et al.

MARSHALL & ROYLE, for respondents.

BOREMAN, J., delivered the opinion of the court.

The appellants, without any notice to the respondents, applied to and obtained from the judge at chambers, a temporary injunction, restraining the respondents from working or taking out ores from a certain mining property called the Undine lode, and from removing or selling the ore.

After service of the writ, the respondents applied to the judge at chambers, without notice to the appellants, and obtained an order revoking the former order, and requiring the United States marshal to restore to the respondents the possession of the Alexander lode from which they had been ejected under the restraining order.

It is from this last order revoking the former order that this appeal is brought to this court.

The respondents in their motion asked that the restraining order be revoked, upon the grounds that the complaint did not state facts sufficient to entitle the applicants to the relief sought, and that the order was improvidently issued.

¹ *Brennan v. Gaston*, 7 M. R. 426; *Actus curiæ neminem gravabit*; *Denver v. Capelli*, 3 Colo. 236; *Widner v. Walsh*, Id. 418. Compare *Vanzandt v. Argentine Co.*, 7 M. R. 634.

The injury complained of as irreparable by the appellants consists in the impossibility of ascertaining the amount and value of the ores taken away from said mine by the respondents, unless they be restrained. The court can not see that there is any great and irreparable damage, for the simple statement of the complaint to that effect is not sufficient. The facts should be stated from which the court could learn that the taking and selling the ores would be such injury. It is not alleged that the removal or sales were clandestine, or that the respondents are insolvent or otherwise unable to respond in damages, or any other facts going to show the nature of the damages.

The writ which was issued upon the restraining order went further than the prayer of the complaint, and restrained the respondents from ever going upon the premises. This would prevent them from removing their own private property. The appellants did not ask that the respondents be restrained from going upon the ground, and the writ was improper in that respect.

The dissolving of an injunction, like the granting, is left to a considerable extent to the discretion of the judge, and unless he abuse that discretion, his action is necessarily held good: High on Injunction, Sec. 899. We can not say, therefore, that the court erred in revoking the restraining order unless his revocation without notice was an error.

The Practice Act, in Sec. 326, provides that orders made out of court, without notice, may be vacated by the judge without notice. This is a very broad provision, and there seems to be no good reason why it should not apply to the case now before us.

That part of the order complained of by the appellants which required the marshal to reinstate the respondents, was, however, beyond the reach of the judge. When the former order was revoked, his authority in the matter ceased, by reason of no notice to the opposite party.

Upon the whole case, therefore, we conclude that the revocation was not improper, and to that extent the action of the judge below is affirmed; but as to reinstating the respondents, the order was not proper, and to that extent it is reversed.

LOWE, C. J., and EMERSON, J., concur.

Reversed.

THE SIERRA NEVADA SILVER MINING COMPANY v.
SEARS.

(10 Nevada, 346. Supreme Court, 1875.)

¹**Stolen stock—Enjoining sale.** A mining company having found a portion of its ground covered by the claim of another company whose stock was held only at a nominal value, bought up the entire amount of such stock; afterward such stock was lost, or as averred by the complaint, stolen, and came into the hands of parties who proceeded to control the corporation by representing such stock, and to act adversely to the company which had bought up the stock. Defendants filed no answer. The court below enjoined defendants from in any manner disposing of said stock: *Held*, that the complaint presented a *prima facie* case for relief in the discretion of the court, the exercise of which discretion in the court below should not be disturbed. BEATTY, J., dissenting.

Insolvency. Where irreparable injury or inadequate relief at law is alleged, insolvency of the defendant need not be superadded.

Verification—Information and belief. A verification which conforms to section 113 of the Practice Act of Nevada is sufficient, and that implies that averments may be made upon information and belief.

Diligence in notifying purchaser of loss of stock. The question whether a party who has lost stock by theft, as alleged, has used due diligence to prevent loss to third parties, can not arise before defendant shows himself to be an innocent purchaser for value.

The discretion of the court below in allowing injunction, upon a *prima facie* case not denied by answer, will not be interfered with.

Appeal from the District Court of the First Judicial District, Storey County.

This action was commenced by the Sierra Nevada Mining Company, a California corporation, against the defendant, W. H. Sears, and the Allen Company, a Nevada corporation. The complaint alleges that about the 9th day of January, A. D. 1871, while the plaintiff was in the possession of its mining ground, working and developing the same, divers parties, among whom was the defendant, the Allen Company, laid claim to a portion thereof, and caused the plaintiff such annoyance, that, to quiet the asserted claim of defendant and to buy its peace, without acknowledgment of any right or title in said defendant to any portion of plaintiff's mining ground, or any ground, it became advisable for plaintiff to buy, and there-

¹ *Coleman v. Columbia Co.*, 3 M. R. 483.

upon plaintiff did buy, and became the owner of the entire capital stock of defendant aforesaid, and from thence hitherto plaintiff hath continued to be, and now is the owner thereof; that the capital stock of the Allen Company then consisted, and now consists, of nine hundred and twenty-five thousand dollars, divided into eighteen hundred and fifty shares, of the par value of five hundred dollars each; that fourteen hundred shares thereof were represented by the stock certificates of defendant aforesaid, issued by it from its books, and bearing the number one hundred and seventy-four, and in the name of T. F. Smith, trustee; that four hundred and seventeen shares thereof were represented by the stock certificate of defendant aforesaid, issued by it from its books, and bearing the number one hundred and seventy-six, and in the name of T. F. Smith, trustee; that said pieces of stock were, by said Smith, for a valuable consideration, duly indorsed, transferred and delivered unto his lawful assignee, and were, from said assignee by this plaintiff, for a good, sufficient and valuable consideration, duly purchased and received; that plaintiff therefrom had the same in its possession, holding them, and each of them, as the owner thereof, until the same were lost; or, as plaintiff is informed and believes, were stolen from it; that plaintiff never voluntarily or knowingly parted with the possession or ownership of said stock or any thereof; that, though diligently inquiring for the whereabouts of said stock, plaintiff could learn nothing thereabout until within the week last past it was informed, and upon such information charges the truth to be, that W. H. Sears, defendant herein, presented the above described stock in said certificates numbered, respectively, one hundred and seventy-four and number one hundred and seventy-six, claiming to be the owner thereof, unto his co-defendant, the Allen Company, and from it demanded the issuance of new certificates in lien thereof, and that said Allen Company, accepting such demand as legal and just, did, in fraud of plaintiff's rights, issue unto said Sears two certificates of its stock, one numbered one, for fourteen hundred shares, and one numbered two, for four hundred and seventeen shares, both issued to W. H. Sears, trustee, and to him delivered and by him now held, while the old certificates, numbers one hundred and seventy-four and one hundred and seventy-six, were taken up by said Allen Company, and are

now held by it; that on the 19th instant plaintiff made demand in writing upon said Sears to deliver to it said stock so issued as aforesaid, to T. F. Smith, trustee, and in lien thereof to surrender to plaintiff the stock issued, as aforesaid, to said Sears, trustee, but he hath neglected and refused, and still neglects and refuses to comply with such demand, or to deliver said stock or any part thereof to plaintiff; that a like demand was made upon the Allen Company, and that it also refused to comply therewith or with any part thereof; that plaintiff is informed and believes, and so charges the truth to be, that defendant Sears, claiming to be the owner of the stock, is attempting to take control of the affairs of the defendant, the Allen Company, and threatens and intends to move its books, papers and effects to the city of San Francisco in the State of California, and beyond the jurisdiction of this court, and further threatens to disincorporate said defendant, the Allen Company, as a corporation of Nevada, and reincorporate the same in the State of California; all of which is in violation of plaintiff's rights respecting the subject of this action, and tending to render the judgment asked herein ineffectual; that the value of the stock aforesaid is merely nominal, and that it is impossible to measure plaintiff's injuries, by reason of the wrongful acts and doings of defendant, in damages, for that its title is thereby clouded, its property depressed in value in a manner which can not be estimated in dollars and cents, and that it will be irreparably injured if such proceedings be continued. Wherefore, etc., etc. The defendant, the Allen Company, made default.

The other facts are sufficiently stated in the opinion.

DELONG & BELKNAP, for appellant.

WHITMAN & WOOD, for respondent.

By the Court, HAWLEY, C. J.

Upon filing its complaint, plaintiff obtained an order requiring defendants to appear on a certain day therein named, and show cause, if any they could, why an injunction should not issue, and in the meantime defendant Sears was

restrained and enjoined from selling, transferring or in any manner disposing of "certain certificates or shares of stock, issued by the Allen Company, to any party, person or corporation than plaintiff." On the return day defendant Sears appeared specially by his attorneys, and moved "to quash and dismiss the order to show cause." The court overruled this motion and ordered that the restraining order be continued until the further order of this court.

This appeal is taken by defendant Sears from the order of the court, "refusing to dissolve the injunction heretofore granted in this action.

Appellant claims that the injunction ought to have been dissolved, because the complaint fails to show that plaintiff has not a plain, speedy and adequate remedy at law, and argues that it had such a remedy by the ordinary action of replevin. From the allegations of the complaint—which, in this case as presented, must be taken as true—it will be observed, as is therein stated, that it is impossible to measure plaintiff's injuries in damages. It is alleged that plaintiff made the purchase of the certificates of stock, to buy its peace, to save annoyance, to avoid litigation and to prevent a cloud upon its title; that the value of said shares of stock was merely nominal, and could not be estimated like the shares of stock in other corporations having a market value.

Under the provisions of section 202 of the Civil Practice Act, 1 Comp. L. 1263, the judgment in actions to recover the possession of personal property must be in the alternative, and if the property can not be delivered, the judgment is satisfied by the payment of damages. In actions of this character, where the remedy at law would be inadequate, and the injury to plaintiff be irreparable, equity will interfere by injunction and restrain the party wrongfully in possession of the property from disposing of it: 2 Wait's Pr. 31, 32, and the authorities there cited. It would, for reasons already stated, be unnecessary for plaintiff to allege the insolvency of the defendant, and the complaint is not defective in this respect.

The verification to the complaint is in the form required by section 113 of the Practice Act, 1 Comp. L. 1174, which implies that the averments of the complaint may be made upon information and belief.

It is argued that the plaintiff so carelessly and negligently left the certificates of stock standing in the name of a trustee regularly indorsed, as to clothe any person, from whom Sears may have purchased, with the *indicia* of ownership thereof. Counsel upon this, as well as other points, assume that Sears was a *bona fide* purchaser for value; a fact that plaintiff was not required to, and did not allege, and which this court, under the averments of the complaint, is not authorized to presume. There is an allegation in the complaint that the certificates were in plaintiff's possession "until the same were lost, or, as plaintiff is informed and believes, *were stolen* from it." The question whether or not due diligence has been used by plaintiff to recover the certificates of stock, or put third parties on notice of its loss, is one that could not be raised by appellant unless it was, at least, shown that he was an innocent purchaser in good faith. It is, therefore, unnecessary to discuss this or other objections urged by appellant.

In our opinion the complaint states a *prima facie* case, and as there was no answer to the complaint, nor any showing made upon the merits of the case, and inasmuch as the granting or refusing an injunction *pendente lite* rests very much in the sound discretion of the court, we do not think its order ought to be disturbed. This disposes of the appeal, and renders it unnecessary to notice the preliminary objections, on questions of practice, urged by respondent.

The order appealed from is affirmed.

BEATTY, J., dissenting.

I dissent upon the ground that the complaint does not make a case for the extraordinary relief sought. The means resorted to by plaintiff for the purpose of quieting its title deserve anything but favor in a court of equity. There are certain classes of transactions which, because they are universally attended by opportunities and temptations to commit a fraud, are presumed, from motives of public utility, to be always fraudulent. It appears to me that the complaint discloses a transaction of that kind. A corporation finds that another corporation is asserting a claim to a portion of the mining ground owned and possessed by it, and is so "greatly

annoyed" thereby that it determines to buy its peace. Instead of pursuing the plain, simple, direct, honest and effective method of accomplishing that object by purchasing its adversary's quit claim, it goes to work to secure the control of the antagonist corporation by buying up its stock. The *modus operandi* is a familiar spectacle. By means of its agents it first gets control of a majority of the stock, and next proceeds to "freeze out" the minority stockholders, which, as they are practically remediless, is an easy operation. It is just possible that a transaction of this kind might be consummated without defrauding the minority; and so is it possible that one who purchases from himself as the agent of the vendor may pay a due regard to the interests of his principal, or a ward make a voluntary donation to his guardian, without being nuduly influenced. But such instances are so extremely rare, and so little to be expected, that every presumption is against their *bona fides*. The same presumption of fraud, I think, should attach to the operation attempted by the plaintiff here, and to the consummation of which he invokes the aid of the extraordinary powers of a court of equity. The case made by the complaint is simply this: If the court does not decree the return of the stock of the Allen Company in controversy, the plaintiff will lose the control of the Allen Company, which may then assert its claim to plaintiff's ground and cloud its title. In view of the extremely liberal remedy afforded by our statute for wrongs of this nature, such a result would not appear to involve irreparable damage to the plaintiff. A recovery of the value of the stock it claims to have lost would restore it to its original position, and it might then proceed by regular and legitimate means to quiet its title or buy its peace. But aside from these considerations, the reason which is conclusive to my mind for denying the injunction and all the equitable relief prayed for is, that the courts, so far from going out of their usual course to aid a transaction of this kind, should sternly discountenance a proceeding which always and inevitably involves temptations and opportunities of fraud, and should therefore be presumed to have been resorted to for fraudulent purposes, especially when there were more direct, legitimate and effective means of honestly accomplishing the avowed object.

Affirmed.

THE OLD TELEGRAPH MINING COMPANY v. THE
CENTRAL SMELTING COMPANY.

(1 Utah, 331. Supreme Court, 1876.)

Proceedings to settle title required in aid of injunction. To entitle a party to injunctive relief, restraining defendants in possession from operating a mining claim, the plaintiff's title must be shown to be clear and undisputed, or it must appear that steps have been taken to establish the title at law, unless satisfactory reasons be shown for not doing so.

Idem—The reason for rule requiring an issue at law. It would be gross injustice to allow a temporary injunction when upon the face of the papers it appears that a perpetual injunction could never be granted. As no perpetual injunction could be sustained on a bill to restrain the working of a mining claim without establishing the title at law, no temporary injunction should be allowed to restrain such working in the absence of any suit to try title, or of excuse for not bringing one.

Appeal from the Third District Court.

Action to enjoin the defendant from threatened trespass upon a certain mining claim.

No other than injunctive relief was asked for in the complaint.

The other facts appear in the opinion of the court.

ROBERTSON & McBRIDE, for appellant.

BENNETT & SUTHERLAND, for respondent.

BOREMAN, J., delivered the opinion of the court.

Injunction relief is all that is prayed in this action. Pending the settlement of the question of perpetual injunction, a temporary one was granted. The defendants filed an answer and moved the court below to dissolve the temporary injunction, which motion was by the court overruled, and thereupon the defendants appeal to this court.

In order to entitle the plaintiff to the relief asked, where that relief is injunctive only, the title of the plaintiff to the property said to be trespassed upon, must be clearly shown and

be undisputed, or steps taken to establish the title by action at law, or valid and satisfactory reasons be shown for not doing so.

In the case at bar, the title is doubtful and disputed, and defendants are in possession, as appears from the bill itself. It is not claimed that steps had been, or were then being taken, to establish the title, and no reason appears why this was not done. The gist of the whole matter seems to be that the plaintiffs desire the defendants enjoined from trespassing upon ground the title to which is disputed by defendants, and defendants are in possession alike with the plaintiffs. It is clear that no perpetual injunction could be granted in such a case, for by so doing the court of equity would become an engine of injustice instead of a shield and protection to legal rights. Where upon the face of the papers it appears that no perpetual injunction could ever be granted in the action, it would be the grossest wrong to allow a temporary one. If such were allowable, a temporary injunction might easily be sought and used to harass and annoy defendants, and the trial of the ultimate rights of the parties as to the title be indefinitely postponed or delayed. The temporary injunction would work as an action of ejectment, and the defendants be deprived of their rights in a manner unjust and without due process of law, and without trial by jury. A court of equity can not be used for such a purpose, and no amount of affidavits can help the claim for injunctive relief. A court of equity will not presume upon such affidavits to try the title, and to make a final disposition of the case the title has to be decided, and it is not the province of a court of equity to do that.

We therefore are of the opinion that the district court erred in granting the temporary injunction, and its action is reversed with costs, and the cause remanded with instructions to the district court to dissolve the injunction.

Reversed.

SCHAEFFER, C. J., concurs.

EMERSON, J., dissents from the doctrine announced by a majority of the court.

EFFORD ET AL. V. THE SOUTH PACIFIC COAST RAIL-
ROAD COMPANY.

(52 California, 277. Supreme Court, 1877.)

Discretion. It is a matter largely in the discretion of the court whether, on the coming in of an answer, a preliminary injunction previously granted shall be dissolved or modified; and, except in a case of palpable error or abuse of discretion, the action of the court below will not be disturbed on appeal.

Appeal from the District Court, Third Judicial District,
County of Alameda.

The plaintiffs alleged in their complaint that they were the owners, as lessees for eight years from the first day of February, 1870, of a tract of land in Centreville, Alameda county, containing one hundred and sixty acres, being a portion of the tract of land and marsh connected therewith, used by the plaintiffs for the manufacture of salt, bounded on the north by a creek, wall and ditch, and on the south by a wall and ditch, and on the east by a creek, wall, ditch and upland; that they were, and had been since the lease was given, in the exclusive and peaceable possession of the land, and had on it extensive beds for the manufacture of salt from sea water by evaporation. The complaint was filed May 17, 1876. The complaint further alleged that the defendant was a corporation, organized for building a railroad along the coast where the land lay, and was about to grade the land for the railroad by building an embankment across the salt beds, and that they would thus destroy the plaintiff's salt works by separating the bed into two parts, and preventing the flow of sea water from one to the other, and that the defendant also threatened to dig up and destroy the salt bed and works, and permanently appropriate the land. An injunction was asked. On filing the complaint a preliminary injunction was granted. On the 24th of May, 1876, the defendant answered, denying, on information and belief, that the plaintiffs were in possession of or owned the premises as lessees for eight years, and deny-

ing on information and belief that the plaintiffs had salt beds on the land, or were manufacturing salt there, and also denying, on information and belief, that it was necessary in the manufacture of salt to have several beds into which the sea water flowed in succession. The answer then denied that the defendant was about to enter upon or threatened to enter on any premises or land of the plaintiffs, or that it was about to destroy plaintiffs' business. The answer then set up that the premises were the property of the Green Point Dairy and Transportation Company, and that said company sold to A. E. Davis in March, 1876, and that the defendant had entered by permission of said Davis, who bought without notice of the plaintiffs' alleged lease. There was also a denial that the lease mentioned in the complaint was a lease of the premises described in the complaint.

The defendant moved to dissolve the injunction on the answer, and on affidavits which were filed. The plaintiffs filed counter-affidavits. The court made an order dissolving the injunction in so far as it restrained the defendant from grading its roadbed, and from making the necessary embankments or cuts for the purpose of its road, upon condition, however, that the defendant in constructing its railroad, provide such culverts as were necessary for a free use of the plaintiffs' salt beds, ditches, and the water flowing therein, and other property of the plaintiffs connected therewith. The plaintiffs appealed from the order.

BISHOP & FIFIELD, for the appellants.

We claim that the plaintiffs were owners of the leasehold interest in the land, and being in possession under their lease, the defendant had no right to take the land for the use of its railroad except by consent of the plaintiffs, or by the judgment of a competent court condemning the land to public use, and the payment of compensation: *San Mateo Water Works v. Sharpstein*, 50 Cal. 284; *Sanborn v. Belden*, 51 Cal. 266.

STEWART & GREATHOUSE, for the respondent.

It is incumbent on the appellants to show that there has been an abuse of discretion on the part of the court in modi-

fyng an injunction: *McGarrell v. Murphy*, 1 Hilt. 132; Freeman on Co-tenancy, 253.

BY THE COURT.

In the view we take of this case, we deem it unnecessary to decide whether the order appealed from dissolves or only modifies the preliminary injunction; and if the latter, whether it is an appealable order. It is a matter largely in the discretion of the district court, whether, on the coming in of the answer, a preliminary injunction previously granted should be continued in force, dissolved or modified; and, except in cases of palpable error or an abuse of discretion, the action of that court in such cases will not be disturbed on appeal: *DeGodey v. Godey*, 39 Cal. 167; *McCreery v. Brown*, 42 Cal. 462; *Rogers v. Tennant*, 45 Cal. 186; *Patterson v. Supervisors*, 50 Cal. 345. Tested by this rule, we see nothing in the facts disclosed by the record to justify us in disturbing the order appealed from.

Order affirmed. Remittitur forthwith.

SAMUEL KAHN V. THE OLD TELEGRAPH MINING CO.
ET AL.

(2 Utah, 13. Supreme Court, 1877.)

Allegations and proofs on motion for injunction. The rule that the proofs must correspond with the allegations applies to the trial of a cause on its merits, and does not apply to proceedings on a motion for an injunction, where the answer is regarded simply as an affidavit.

Injunction against tenants in common. Where the defendant is in the possession of a mining claim, and is the undisputed owner of two thirds thereof, and claims the entire property under a *bona fide* claim of title, and is pecuniarily responsible for all damages that plaintiff, his co-owner, may sustain by reason of the working of the mine, an injunction will not be granted.

¹Right of co-tenant to injunction. As a general rule, the owner of a minor interest in a mining claim, out of possession, is not entitled to an injunction against the owner of the major part thereof, who is in possession and working the whole, where it does not appear that the party so in possession is unable to respond in damages to the party out of possession.

¹ *Lorenz v. Jacobs*, 2 West C. R. 722.

¹ **Injunction for acts already done.** An injunction is a preventive remedy only and can not be invoked to restrain a party from doing an act which he has already done. In such a case a party must be remitted to his remedy at law.

Appeal from the Third Judicial District Court.

The facts appear in the opinion of the court.

ROBERTSON & McBRIDE and HOFFMAN, for appellant.

"Each party must allege any fact which he is required to prove, and is precluded from proving any fact not alleged," is a fundamental rule, as old as the history of pleading, and is nowhere more strictly enforced than under the code: *Green v. Palmer*, 15 Cal. 411.

The court will see that the fact that the defendants own the "No You Don't" mine, though admitted, could not help their case. There is no conflict between the two claims which could be made the subject of a protest. Such a protest, if made, would be disregarded.

The precise question has arisen and been decided by the commissioner of the general land office. The conflict, if any, in this case is "under ground." Copp's Mining Decisions, pp. 27, 28, 29.

The surface ground of the "Montreal" is not pretended to be claimed by the "No You Don't," and yet its pretended owners drive us from premises they do not have a pretense or shadow of claim to; take possession of not only the ore, but all our works and improvements; appropriate them to their use in despoiling our mine, as we say—in working theirs, as they say—and the court tells us they shall not be enjoined.

The Mining Act provides that a party may follow his lode in its dip to any depth, though it may enter the land adjoining, but it specially preserves the right of adjoining occupants to anything except the lode. Section 3, last paragraph.

Recent mining decisions show that the department will patent a lode which lies underneath a town site, and the patentee may work his lode, but he can not enter the houses of town lot proprietors, or any other improvements situated in or on the land, and is as much a trespasser in doing so as the most perfect stranger; such are the decisions.

¹ *Mammoth Co's App.*, 7 M. R. 460.

The burden of proof is on the defendants. They allege the identity, and must prove it or fail in their defense. The most that can be said for the defendants is that they leave the question an open and doubtful one.

The rule in such cases is, that the party most liable to be injured should have the injunction to protect his rights pending the litigation: 18 Cal. 206; 23 Cal. 85.

The first care of a court of equity is to preserve property intact pending litigation as to the title: 13 Cal. 588; 15 Cal. 107; 34 Cal. 270; 14 Cal. 379-460.

The statute is mandatory: Sec. 112 *et seq.*

BENNETT & HARKNESS, for respondents.

On motion for, or to dissolve interlocutory injunction, answer regarded as *affidavit*: High, Sec. 989, 981; *Falkinburg v. Lucy*, 35 Cal. 52; *Delger v. Johnson*, 44 Cal. 182.

On question of title, affidavit not admissible to contradict answer: High, 992.

Granting or refusing an injunctive order rests largely in the discretion of the court: 17 Cal. 102; 39 Cal. 157; 50 Cal. 344.

SCHAEFFER, Chief Justice, delivered the opinion of the court.

This is an appeal from an order of the third district court denying or refusing a motion for a preliminary injunction made by appellant. The complaint contains two causes of action: one at law, for the recovery of the possession of an undivided one third of the Montreal mining claim; and the other an equitable cause of action, asking for an accounting and an injunction. The latter, or equitable cause of action, is the only one now before us for review. The hearing in the district court was upon an order to show cause why an injunction, *pendente lite*, should not be granted. The court below refused the injunction and dissolved the restraining order previously granted. These rulings of the court are assigned for error.

The plaintiff claims an undivided one third interest in the Montreal mining claim as a *bona fide* purchaser from the

locators thereof, and the defendant, The Old Telegraph Mining Company, claims the whole of it by virtue of a purchase in good faith from the locators of the No You Don't mining claim, which is confessedly the older location of the two. The proof shows (see Holden's affidavit, p. 100 of transcript) that on the 3d day of April, 1876, the defendants, The Old Telegraph Mining Company, "to avoid litigation or being harassed by adverse claims," etc., purchased and received a deed from the owners of the alleged Montreal mining claim to two thirds of said Montreal mining claim. This is not denied by the proof, and was admitted by the plaintiff's attorney in the argument. The plaintiff's attorney takes the position that as this claim of a two thirds interest was not set up in the answer, the defendants can not avail themselves of it by proof: *i. e.*, that the proof must correspond with the allegations in the pleadings. This is admitted to be the rule on the trial of the merits of a case, but does not apply in the case at bar. For the purposes of this motion the answer is regarded simply as an affidavit, and does not prevent the presentation of other affidavits setting up other and different causes for the refusal of the writ prayed for: *Falkinburg et al. v. Lucy et al.*, 35 Cal. 52; *Delyer v. Johnson*, 44 Cal. 182.

The plaintiff asks for an injunction on the ground that he is the owner and entitled to the possession of one third of the Montreal mining claim, and that the defendants unlawfully entered upon the same, ousted the plaintiff therefrom, and are taking the ore from it, and are thus rendering it valueless, and inflicting an irreparable injury upon the plaintiff. The defendants resist the application for an injunction upon two grounds: First, they deny the ownership and right to the possession of plaintiff to one third of said Montreal claim, and allege that the defendant owns the whole thereof, it being a part of the No You Don't claim, of which the defendant is the owner and the possessor; and, secondly, because the defendant is the owner of two thirds of the said Montreal claim by purchase from the co-owners of plaintiff, and therefore the defendant has the better right to the possession thereof. The truth or otherwise of the former resisting proposition depends entirely upon the continuity of the vein or lode from the No You Don't discovery point to the Montreal lode,

where the injury is charged to be committed and threatened. This appears to have been the main question litigated in the court below, and nearly all the affidavits presented by the respective parties bear upon this point. The proof upon this point is so conflicting that it would require a very close investigation to determine on which side the greater weight was, a task which, we think, this court could not properly assume in the case at bar. The title to the property is seriously and apparently *bona fide* in dispute. The defendant is in possession under such claim of title. It does not appear that the defendant is insolvent or pecuniarily unable to respond to any damages the plaintiff may sustain. Nor does it appear but that the defendant would, by being enjoined, sustain as great, or greater, an injury as the plaintiff can sustain by the refusal of the writ. Under these circumstances, we think the court did right in refusing the injunction and in dissolving the restraining order previously granted: High on Injunctions, §§ 261, 262; *Schlect's Appeal*, 60 Pa. St. 172; *City of Ottawa v. Chicago & R. I. R. R. Co.*, 25 Ill. 43.

The facts alleged in support of the second resisting proposition are not disputed by the proof, but the conclusion drawn from those facts is disputed by the plaintiff. Relief by injunction will sometimes be allowed between tenants in common, for the purpose of preserving the estate and preventing serious injury; and such relief can, with propriety, be invoked more frequently in reference to mining claims than any other rights in or to real estate, owing to the peculiar character or nature of the property in question; but we are not advised of any authority which holds that the party confessedly owning the major part of the mines, and possessing and working it in the ordinary way, was enjoined from so possessing and working it, at the instance of the party owning the minor part thereof, without making it to appear that the party possessing and working the mine was unable to pay the damages that might be awarded against him for his wrongful acts in excluding the other from the benefits of such mine; and, as a matter of principle, *such can not be the law*.

The position taken by the attorneys for the plaintiff, that under the mining laws the owners of the No You Don't lode can only follow such *lode* outside of their surface location

as provided by such laws, but they can not legally appropriate to their use the surface, the tunnels, improvements, workings and avenues of access to such lode outside of the No You Don't claim, is doubtless true; but that their having so appropriated the same is good cause for an injunction, does not necessarily nor properly follow.

An injunction is a preventive remedy only, and can not be invoked to restrain a party from doing an act which he has already done. In such a case, the party injured must be remitted to his remedy at law, which is, in every respect, competent to afford adequate relief: *Vangelin et al. v. Goe*, 50 Ill. 459.

Viewing this case from every standpoint which we have been able to take, we are clearly of the opinion that the district court, in refusing the injunction and dissolving the restraining order, did not only not abuse the discretionary power which it was called upon to exercise, but that it acted in strict conformity with the principles of law and equity applicable to the case.

The order of the district court is affirmed.

EMERSON J., concurs.

THORN V. SWEENEY ET AL.

(12 Nevada, 251. Supreme Court, 1877.)

¹ **Condemning land for bringing water to towns.** It is within the power of the legislature to pass an act for the condemnation of land for the purpose of bringing water into cities and towns. Such a taking would be for a *public use* within the meaning of that term as used in the constitution.

Technical, distinguished from destructive trespasses. The construction of a ditch across rocky, barren and uncultivated land is not an irreparable injury. The distinction between technical trespass and trespass going to the extent of irreparable injury, is the foundation of the jurisdiction of equity in the latter class of cases, and trespass in the former class of cases will not be enjoined, although the plaintiff's legal right to the land may not be denied, the defendants being solvent and able to respond in damages.

¹ See *Robertson v. Smith*, 7 M. R. 196.

Irreparable injury may not be averred in terms without stating the facts which produce such result.

¹ **Easement, how acquired.** An easement in land can only be acquired by the consent or acquiescence of the owner.

Appeal from the District Court of Ormsby County, Second Judicial District.

The facts are stated in the opinion of the court.

T. W. W. DAVIES, for appellants, who were defendants below.

ROBERT M. CLARKE, for respondent.

By the Court, HAWLEY, C. J.

This appeal is from an order refusing to dissolve a temporary injunction. The motion to dissolve is based upon the complaint and answer, and oral testimony submitted at the hearing.

The complaint alleges that plaintiff is the owner in fee of certain land; that the defendants unlawfully entered upon it, dug up and removed the soil, dirt and earth thereon, and excavated and made a ditch for the purpose of conducting water therein, and with the intent and purpose to establish and acquire an easement and servitude in said land, to the injury of said land, to plaintiff's damage in the sum of five hundred dollars; that defendants are upon said land removing the soil, dirt and earth therefrom, and threaten to continue said acts, and to complete and maintain said ditch, easement and servitude, and to turn water into the same when completed, and to continue to flow water through the same and across the land of the plaintiff perpetually in the future, to the permanent and irreparable injury of the plaintiff and his said land.

The answer admits that the plaintiff is the owner of the land; it denies that defendants, or either of them, unlawfully committed the acts alleged; denies that by their acts "the plaintiff has been, is, or will be damaged irreparably." or that he has been, is, or will be damaged in any sum whatever.

¹ *Lawrence's App.*, 7 M. R. 542.

² S. C. on second appeal, 13 Nev. 415.

For further answer, the defendant, M. Rinckel, avers that he is the owner of the Carson water works, with all its privileges, franchises, property and appurtenances, and being so the owner of the same he desired to construct a ditch through plaintiff's land, to be used in connection with said works; that said defendants, being unable to obtain the consent of said plaintiff to construct said ditch, by offering to pay full compensation for said land, and for all injury that might be done thereto, proceeded under the provisions of the act entitled "An act to allow any person, or persons, to divert the waters of any river or stream, and run the same through any ditch or flume, and to provide for the right of way through the lands of others" (2 Comp. L. 3852 to 3855); that the defendants selected an appraiser, and (the plaintiff refusing to act under said law) this appraiser selected another, and these two selected a third, and the appraisers thus selected assessed the damages at twenty-five dollars, which amount was, by defendants, tendered to plaintiff, and by him refused; that defendants have in all respects complied with the provisions of said law; that the land over which the ditch would run is rocky, barren and of no value whatever; that plaintiff has not and will not suffer any damage whatever by the entry of defendants or by the construction of a covered ditch across his land; that defendants, and each of them, are solvent and able to respond in damages in any sum that plaintiff may recover against them. The defendant Rinckel further avers that he has been damaged in the sum of one hundred dollars, and that he will be further damaged in the sum of twenty dollars per day for each and every day that he is prevented from completing said ditch by being "deprived of the use of the water in his reservoir for said water works for the supply of persons in Carson City." It is also alleged that plaintiff has a plain, speedy and adequate remedy at law.

The oral testimony substantiates the material allegations in the answer.

Respondent claims that the act under which the defendants sought to condemn his land is unconstitutional and void for two reasons: "First. Because it seeks to take private property for private use. Second. Because the method provided for the condemnation of the land is not by due process of law." And he therefore contends that, inasmuch as defendants ob-

tained no rights by virtue of said act, and as they admit his title to the land, he is entitled as matter of right to the injunction, because the defendants threaten to continue their unlawful acts, and acquire an easement in said land.

We think the principles decided by this court in *Dayton Gold and Silver Mining Company v. Seawell*, 11 Nev. 394, are conclusive upon the point that it is within the power of the legislature to pass an act providing for the condemnation of land for the purpose of bringing water into cities and towns, and that such a taking would be for a "public use" within the meaning of that term as used in the constitution.

The second objection urged by respondent's counsel presents a question of grave importance which ought not to be decided without mature consideration, and it is one which, from the views we take of this case, it is unnecessary at the present time to decide.

Admitting for the sake of argument, without deciding the point, that the act is in this respect unconstitutional, does it necessarily follow that the injunction should not be dissolved? We think not. The foundation of the jurisdiction in a court of equity to issue an injunction, in aid of the action of trespass, is the probability of irreparable injury, the inadequacy of pecuniary compensation, or the prevention of a multiplicity of suits where the rights are controverted by numerous persons. In our opinion the facts of this case do not bring the plaintiff within this rule.

It is not sufficient that the complaint alleges that the injury would be irreparable. The plaintiff must affirmatively show how and why it would be so, otherwise the extraordinary remedy by injunction ought not to be allowed. The allegation that defendants will acquire an easement or servitude in the land is answered by the fact that no such easement or servitude could be acquired except by the consent or acquiescence of the plaintiff: Washburn's Easements and Servitudes, 3 Ed., 113, 131, 160.

The construction of a ditch across the rocky, barren and uncultivated land of plaintiff is not an irreparable injury: *Waldron & Joiner v. Marsh et al.*, 5 Cal. 119. If any injury is done to the land by the construction of the ditch the defendants are solvent and able to respond in damages, and the plaintiff has a plain and adequate remedy at law.

This brings us to a consideration of the real question at issue, whether the plaintiff is entitled to the injunction as a matter of right, notwithstanding the fact that the injury will be slight and the damages trivial, because the defendants threaten to continue their illegal acts. It is well settled, that where the title is undisputed, or has been settled by an action at law, and the plaintiff is liable to be irreparably injured by the continued acts of trespass, an injunction should issue. This rule, very properly, prevails in all cases where, as in *Daubenspeck v. Grear*, the plaintiff is threatened with injuries which would, if committed, result in the destruction of his property.

In such a case, "the fact that the defendants are willing to pay for the property is immaterial, for there are no means of determining whether the value of the property in money would compensate the plaintiffs for its destruction." 18 Cal. 443. But whilst this rule is universal, it does not by any means follow that the same rule prevails as a matter of course, simply because the title is undisputed, where no appreciable injury will be done by the acts that are threatened to be continued. This fact is clearly pointed out in the opinion of the chancellor in *Jerome v. Ross*, a leading case upon this subject. "I do not know a case," says the chancellor, "in which an injunction has been granted to restrain a trespasser, merely because he was a trespasser, without showing that the property itself was of peculiar value and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. In ordinary cases the damages to be assessed by a jury will be adequate for a check and for a recompense.

"Every man is undoubtedly entitled to be protected in the possession and enjoyment of his property, though it may be of no intrinsic value. He may have on his land a large mound of useless stone or sand, which he may not deem worth the expense of inclosing, and yet it would be a trespass for any person to remove any portion of the stone or sand without his consent; and he would be entitled to his action, even though the damages were nominal. But would it be proper for this court to assume cognizance of such a trespass and lay the interdict of an injunction upon it? I apprehend not." 7 Johns. Ch. 334. In answering the objections as to multiplicity of suits, the learned chancellor, in the same case, says:

"A court of equity will sometimes interfere to prevent a multiplicity of suits, by a bill of peace. * * * But that is only in cases where the right is controverted by numerous persons, each standing on his own pretensions, and it has no application to the case of one or more persons choosing to persevere in acts of trespass, in despite of suits and recoveries against them. A troublesome man may vex and harass his neighbor, by throwing down his fences and turning cattle upon his grounds, or by passing over them, or otherwise annoying him; but it is to be presumed that repeated recoveries for damages, with the punishment of costs, and such smart money as a jury would naturally give, would soon effectually correct any such disposition. At any rate, I do not know that a court of equity has ever interfered merely to correct such a practice, and it would certainly require very strong evidence of the inefficacy of the ordinary legal remedies for compensation, as well as for correction, before this court would venture to assume a jurisdiction hitherto unknown." p. 337. Equally clear and positive is the language of the vice-chancellor in *Wood v. Sutcliffe*: "Whenever a court of equity is asked for an injunction in cases of such a nature as this, it must have regard not only to the dry, strict rights of the plaintiff and defendant, but also to the surrounding circumstances; to the rights or interests of other persons, which may be more or less involved; it must, I say, have regard to those circumstances before it exercises its jurisdiction (which is unquestionably a strong one) of granting an injunction. * * * I can not assent to the proposition that, on the mere dry fact of the plaintiff's having the abstract right, a court of equity will, as a matter of course, on that right being established at law, grant an injunction if the right be infringed ever so minutely." 42 Eng. Ch. 165.

The rule applicable to the facts of the case under consideration is very fully and correctly stated in a carefully considered opinion, in *Bassett v. Salisbury Manufacturing Co.*, where the question was presented to the court whether a judgment in a suit at law, establishing the plaintiff's title, justified the issuance of an injunction where the trespasses complained of, though slight and trivial, were threatened to be continued. The court say: "The power to grant in-

junctions to prevent injustice has always been regarded as peculiar and extraordinary. It is not controlled by arbitrary and technical rules, but the application for its exercise is addressed to the conscience and sound discretion of the court. Ordinarily it will not be exercised when the right of the complainant is doubtful and has not been settled at law; and even when it has been so settled, an injunction will not be granted when the remedy at law is adequate. It is not enough that an injury merely nominal or theoretical is apprehended, even although an action at law might be maintained for it; but to justify the interposition of this summary power, there must be cause to fear substantial and serious damage, for which courts of law could furnish no adequate remedy. What injuries shall be regarded as irreparable at law must depend upon the circumstances of the particular case. If the injury be trivial, as by * * * raising the water of a river a few inches upon his rocky shore, doing him no appreciable or serious damage, equity would not ordinarily interfere by injunction, even in cases where the right had been established at law; for the power is extraordinary in its character, and is to be exercised in general only in cases of necessity, and when the court can see that other remedies are inadequate to do justice between the parties; and even then it is to be exercised with great care and discretion. If the granting of an injunction would necessarily cause great loss to the defendant, a loss altogether disproportioned to the injury sustained by the plaintiff, that fact should be considered in determining whether the application should be granted, and in some cases it would justly have great weight. It has often been supposed that when the right has been established at law, the plaintiff would be entitled to an injunction as matter of course; and this misapprehension has arisen probably from the fact that in a large number of cases injunctions have been refused upon the express ground that the title of the plaintiff had not been established at law, leaving room for the inference that if it had been so established the injunction would have been issued. This, however, is clearly not the doctrine of courts of equity, for they will not ordinarily exercise this summary and extraordinary power when substantial justice can be done by courts of law." 47 N. H. 437.

The doctrine announced in this case is fully supported by

the following authorities: *Bigelow v. The Hartford Br. Co.*, 14 Conn. 565; *Wason v. Sanborn*, 45 N. H. 170; *Blake v. City of Brooklyn*, 26 Barb. 301; *Murray v. Knapp*, 42 How. Pr. 462; 62 Barb. 566; *Nicodemus v. Nicodemus*, 41 Md. 537; *Weigel v. Walsh*, 45 Mo. 560; *Bechtel v. Carlslake*, 11 N. J. Eq. 244; *Catching v. Terrell*, 10 Ga. 578; *Wooding v. Malone*, 30 Ga. 980; High on Inj., Secs. 459, 483; Eden on Inj., 231; 2 Story's Eq., 925, 928.

It follows from the views above expressed that plaintiff is not entitled to the extraordinary remedy he seeks.

The discretion with which the *nisi prius* judge is clothed in granting or refusing injunctions is a legal, not an arbitrary, discretion. It seems to us quite clear that no restraining order ought to have been issued upon the complaint in this action. It is evident that it ought to have been dissolved upon the motion and showing made by defendants.

In the consideration of this case, we have treated the defendants as naked trespassers. Their acts, however, were neither wanton nor malicious. It is manifest that their object was not to destroy the substance of plaintiff's estate, or in any manner to injure his property to an extent that could not be fully compensated in damages. They threatened to continue their acts, not for the purpose of destroying plaintiff's property, but with intent to save their own. They acted from beginning to end in apparent good faith, offering in advance to fully compensate plaintiff for any injury that he might receive. This being refused, they proceeded in strict compliance with the provisions of an existing statute that has never been declared unconstitutional by this court. These were proper matters for the court below to have taken into consideration, and would certainly have fully justified it in dissolving the injunction.

If it is finally decided that the law is constitutional, then the plaintiff will be bound by the award of the arbitrators; otherwise he will be entitled to recover damages for whatever injury, if any, he has sustained by reason of the acts complained of.

The order of the district court refusing to dissolve the injunction is reversed, the injunction is dissolved, and the cause remanded for further proceedings.

Reversed.

CLEGG ET AL. V. JONES ET AL.

(43 Wisconsin, 482. Supreme Court, 1878.)

¹ **Verdict in equity not conclusive.** In an equitable action a verdict has not the same conclusive weight as an action at law; and, on appeal from a judgment pursuant to such verdict, this court reviews the evidence.

Evidence necessary to establish exclusive mining lease. One who claims an exclusive right to mine on a tract of land by virtue of an alleged parol lease, and seeks a perpetual injunction restraining others from mining thereon, though the latter do not interfere with his development of his own range, must establish such right by clear and satisfactory evidence; and the evidence in this case (for which see the opinion) is held insufficient.

² **Parol lease—Statute of Frauds.** Whether a parol lease without expressed limit of time, if established by clear and unequivocal proof, would be valid under the Statute of Frauds, as a lease for one year, and whether it would be renewed from time to time by payment of rent, not considered; but it *seems* that Ch. 260 of 1860, amended by Ch. 117 of 1872, does not affect the case.

New trial, when not allowed, on reversing judgment. No probability appearing that the evidence would be materially different on a new trial, this court, on reversing a judgment for the plaintiffs, directs a dismissal of the complaint.

Appeal from the Circuit Court for Iowa County.

Action for a perpetual injunction, restraining defendants from mining on a certain portion of a forty-acre tract of land. The relief was claimed in the complaint upon two grounds: 1. That plaintiffs had the exclusive right to mine upon said tract, under a parol lease from one Vivian, the agent of the owner, made June 24, 1873, under which they claim to have been in exclusive possession of the premises until disturbed in their possession by defendants in October, 1876. 2. That the place where defendants were mining was part of a valuable discovery, lode or range struck and discovered by plaintiffs in 1870. The latter claim, however, was abandoned on the trial. The answer, among other things, denied plaintiffs' exclusive right.

The evidence for the plaintiffs, and the exceptions taken by the defendants, will sufficiently appear from the opinion.

¹ *Law v. Grant*, 7 M. R. 57; *Fabian v. Collins*, 5 M. R. 20.

² *Friedhoff v. Smith*, 13 Neb. 5.

The judge submitted to the jury the following questions: "What were the terms of the lease between Vivian and the plaintiffs, if any? Was it a lease of all the minerals contained in a certain piece of land, as claimed by the plaintiffs?" The jury answered the second question affirmatively. The court afterward found the facts substantially as alleged in that part of the complaint which was not abandoned, and rendered judgment for the relief demanded; from which the defendants appealed.

There was a brief for the appellants, signed by Wm. E. Carter, with Reese Carter, and oral argument by Wm. E. Carter. They contended, 1. That there was no sufficient evidence of the alleged lease, or exclusive right. 2. That there was no consideration to support the alleged lease; plaintiffs, at the date thereof, not having undertaken to do or pay anything in consideration of a new right granted. 3. That the case was not affected by Sec. 2, Ch. 260, Laws of 1860, because no discovery or prospect has been "struck" upon the property claimed to have been leased June 24, 1873 and indeed it is not claimed that plaintiffs have struck any discovery on any land since that date. 4. That, if not protected by that act, the pretended lease was void under the Statute of Frauds. Upon this point, counsel referred to the brief for the respondents in *Sobey v. Thomas*, 39 Wis. on p. 323.

ALEXANDER WILSON, for the respondents, contended, 1. That there was sufficient evidence to support the verdict. 2. That the lease was renewed by each payment of rent, from time to time, as the mining progressed. 3. That a parol license to enter upon mineral lands and mine them, for a specified share of the mineral raised, for an indefinite time, with an entry under such license, and an expenditure of labor and money in sinking shafts, running drifts, procuring machinery, and other preparations for mining under the license gives to the licensee a valid subsisting interest in the real estate, which the licensor can terminate only upon compensation for such expenditure, or the notice necessary to terminate a tenancy at will: *Berick v. Keen*, 2 Am. L. C. 733; *Wichersham v. Orr*, 9 Iowa, 253, 260; *Beatty v. Gregory*, 17 Id. 109; *Bush v. Sullivan*, 3 G. Greene, 344.

COLE, J.

The plaintiffs do not rest their claim for an injunction on the ground that the diggings worked by the defendants were upon the same range as that upon which the diggings of the plaintiffs were situated. In the complaint this was stated as one ground of relief; and it was alleged, among other things, that the lead ores which the defendants had taken and carried away, or which they threatened to take and were about to carry away, were taken from a range which was connected with and formed a part of the plaintiffs' discovery or range. But upon the trial below the plaintiffs, before any testimony was offered, withdrew all claim to relief upon that ground, and their learned counsel, on the argument in this court, said he did not rely upon that ground to sustain the judgment. The plaintiffs' right to the perpetual injunction is founded and must rest entirely upon their rights under the alleged parol lease made by Vivian, the agent of the owner, with them, on or about the 24th of June, 1873, in and by which they claim the exclusive right and privilege was granted them to mine, according to mining usages, for lead and zinc ores, upon any part of the tract of land lying northward of the line designated in the complaint, upon paying one tenth part of all ores, whether of lead or zinc, raised by them from the leased premises, as rent therefor. After all the evidence had been received the counsel for the defendants asked the court to submit to the jury certain questions. This the court declined to do, but did submit the question as to what were the terms of the lease made between Vivian and the plaintiffs, if any, and whether it was a lease of all the mineral contained in the piece of land above mentioned, as claimed by the plaintiffs. The jury gave an affirmative answer to the question. A number of errors assigned relate to the rulings of the court admitting or excluding evidence, to the refusal to submit to the jury the questions asked for by the defendants, and to errors in the charge. But these errors were not argued by defendants' counsel, except so far as they were involved in the discussion of the following questions: 1. Does the evidence sustain the alleged exclusive lease? and 2. If so, is the lease valid and binding in law, and of such a character that it could not be revoked by the landlord?

This was an equitable action, and the finding of the jury upon all questions of fact can not have the same conclusive effect as in actions at law: *Gill v. Rice*, 13 Wis. 549. The verdict of the jury is merely to enlighten the conscience of the chancellor: *Johnson v. Johnson*, 4 Wis. 135. We have therefore to examine the evidence for ourselves, and see if it sustains plaintiffs' claim to an exclusive right and privilege to mine upon the whole north part of the forty-acre tract. And upon that question we are very clear that the evidence establishes no such right.

The principal evidence adduced to prove this exclusive right was the testimony of the plaintiff, Samuel Clegg. He details the circumstances attending the making of the parol lease, and even attempts to give the very words used by Vivian when he made it. Clegg had been mining upon the forty-acre tract for some years, and had made a valuable discovery of mineral thereon. He says, in substance, that on the 24th of June, 1873, he went to see Vivian, and to pay rent due. He then stated to Vivian something about trespassers, and current reports that a party of men were coming upon the north part of this forty, between the plaintiffs' shaft or diggings and Glandville's fence; stated that the plaintiffs were then paying out for men, wages and materials about \$500 per month; that it looked hard that men should come and head the plaintiffs off that way, especially as Vivian had previously granted him, the witness, full permission, and had said to him that no one should come north or south of him on these diggings to interfere with witness in any shape. In reply to these remarks, Vivian said: "Old man, rest satisfied, there is no one shall come on that land between Johnson Glandville's fence and you, nor east of you, north, south, east or west of you." This is the substance of the testimony in regard to the terms of the parol lease granting an exclusive right to mine on the north part of the tract. And while it is slightly corroborated by other testimony given on the part of the plaintiffs, yet upon the most favorable construction which can be placed upon it, it fails to establish the exclusive right claimed. The language is loose, vague, uncertain and indeterminate in its meaning. When considered in connection with the other evidence, more especially the testimony of Vivian, it only warrants this in-

ference and establishes this fact: The plaintiff had received permission to mine upon the tract, and was granted the right to prove up his diggings and follow any range he might discover on the land without let or hindrance from any one. It is evident that Clegg was afraid some one would interfere with his rights, or attempt to trespass upon his range. He therefore sought protection of the agent against any such interference, and was assured that no one should interfere with his diggings or his right to follow up and prove his range on the land, wherever it should run. This is all, we think, that can be inferred from the language used, and it is precisely what Vivian testifies the right was which he granted. Without dwelling upon the testimony any further, however, we are constrained to say that the exclusive right to mine upon the tract in question is not established by that clear and satisfactory evidence which is essential to warrant the court in granting a perpetual injunction against others mining on the same, who did not interfere with the plaintiffs' existing rights in developing their range.

If this exclusive right had been established by clear, definite and unequivocal proof, we should then have to determine whether the parol lease would be valid under the Statute of Frauds. In *Ganter v. Atkinson*, 35 Wis. 48, by an oral agreement, the owner of certain lands gave the plaintiffs the right to enter thereon for mining purposes, and the exclusive right to mine in or upon the same, and to take any ores therefrom for a certain rent in kind. The lease was upheld as a lease for one year. But there the lease was of particular ground described by metes and bounds. If, in this case, the parol lease of an exclusive right had been proven, as claimed by the plaintiffs, the question would arise, whether it would be renewed from time to time by payment of rent. But as the case stands, no such question is before us. Nor do we see that Ch. 260, Laws of 1860, and the amendatory act (Ch. 117, Laws of 1872), affects the case.

In some cases this court, on reversing the judgment in an equity case, has ordered a new trial, where there was reason to suppose that important testimony had been omitted or might be procured which would materially affect the rights of parties, and that the cause of justice would be promoted thereby. In this case, however, there does not seem to be any

EDWARDS V. ALLOUEZ MINING COMPANY. 577

object in granting a new trial, since there is no probability that the evidence in regard to the parol lease would be changed by our doing so.

By THE COURT.—The judgment of the circuit court is reversed, and the cause remanded, with directions to dismiss the complaint. *Reversed.*

EDWARDS V. THE ALLOUEZ MINING COMPANY.

(38 Michigan, 46. Supreme Court, 1878.)

General rules applicable to injunctions. Injunctions are to prevent irreparable mischief and stay consequences that could not be adequately compensated; their allowance is discretionary and not of right. They call for good faith in the petitioner, and may be withheld if likely to inflict greater injury than the grievance complained of.

¹ **Motives of petitioner inquired into.** Where, by inviting an injury, one places himself in a position to call for an equitable remedy, his motives can be inquired into, even though he grounds himself on a strict legal right.

² **Injunction to restrain a provoked injury denied.** A man bought for speculation certain bottom lands upon which large quantities of sand were being deposited by a stream, which operated a stamp mill higher up. He put a valuation upon the land of from three to five times what it cost him, and tried to sell it to the corporation which owned the mill, but it declined to buy. Then he prayed for an injunction to restrain the corporation from sanding his land and polluting the stream: *Held*, that an injunction would not lie, and that the speculator was entitled to such remedy as the law would give him, and no more. CAMPBELL, C. J., dissented.

Appeal from Washtenaw, the case having been transferred from Keweenaw. Submitted October 17, 1877. Decided January 9, 1878.

Injunction. The writ was denied and complainant appealed. The facts are in the opinion.

BALL & OWEN, and G. V. N. LOTHROP, for complainant.

W. D. WILLIAMS, for defendant in error.

¹ *Field v. Beaumont*, 7 M. R. 257; *Munson v. Tryon*, 7 M. R. 469.

² *Lyon v. Woodman*, 7 M. R. 493; *Bankart v. Houghton*, 27 Beav. 425; *Post NUISANCE.*

COOLEY, J.

This is an injunction bill, and the facts are very simple. Defendant, at a cost of some sixty thousand dollars, erected a stamp mill on the banks of Hill creek, in the year 1874, and has since been operating it for copper mining purposes. As a result of its operations large quantities of sand are carried down by the waters of the stream and deposited on the bottom lands below.

The evidence leads to the belief that it would be impossible to carry on the mining operations of the defendant with profit unless this is permitted. The year following the erection of defendant's mill, complainant purchased a piece of land through which the creek runs a short distance below the mill, and upon which the mill as operated was depositing sand. The land was not purchased for use or occupation, but as a matter of speculation, and apparently under an expectation of being able to force defendant to buy it at a large advance on the purchase price. It was offered to defendant soon after the purchase, and though no price was named, the valuation which has been put upon it by complainant and his witnesses, is from three to five times what it cost him, and this perhaps gives some indication what his expectations were. The real value of the land except as a convenience in the business of defendant would seem to have been small. When defendant declined to purchase, this bill was filed. The prayer is that defendant be restrained from running or depositing its stamp sand on complainant's land, and from polluting the waters of the stream by its operations. This is a short statement of so much of the case as is material to what follows. The circuit judge refused the injunction prayed for, but ordered a reference to a jury for an assessment of damages.

There is no doubt that the operations of defendant, whether they inflict any serious injury on complainant or not, amount in effect to an appropriation of that portion of his property upon which sand is being deposited: *Ashley v. Port Huron*, 35 Mich. 296; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Arimond v. Green Bay Co.*, 21 Wis. 316; *Rowe v. Portsmouth*, 56 N. H. 291; *Woodward v. Worcester*, 121 Mass. 245. It follows and is beyond question that complainant sustains

a legal injury for which he is entitled to suitable redress. The only question on this record is, whether he is entitled to the special redress he seeks, namely, an injunction.

An injunction is not a process to be lightly ordered in any case, where the effect will be to present to the owners of a valuable mill the alternative either to purchase complainant's lands at his own price or to sacrifice their property; any court having the power to order it, ought very carefully to scrutinize the case and make sure that equity requires it. In theory its purpose is to prevent irreparable mischief; it stays an evil the consequences of which could not adequately be compensated if it was suffered to go on: *Gilbert v. Showerman*, 23 Mich. 448; *Bemis v. Upham*, 13 Pick. 169; *Wason v. Sanborn*, 45 N. H. 169; *Cockey v. Carroll*, 4 Md. Ch. 344; *Nicodemus v. Nicodemus*, 41 Md. 529; *Burgess v. Kattleman*, 41 Mo. 480; *Owen v. Ford*, 49 Mo. 436; *Morris, etc., Co. v. Central R. R. Co.*, 16 N. J. Eq. 419; *Pettibone v. La Crosse, etc., R. R. Co.*, 14 Wis. 443; *Hins v. Stephens*, 33 Conn. 497; *Rhodes v. Dunbar*, 57 Penn. St. 274; *Richard's Appeal*, Id. 105; *Harkinson's Appeal*, 78 Id. 196; *State v. Judge*, 16 La. Ann. 233; *Goodell v. Lassen*, 69 Ill. 145. The writ "is not *ex debito justitiæ*, for any injury threatened or done to the estate or rights of a person, but the granting of it must always rest in sound discretion, governed by the nature of the case." *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 50. As is said in another case, "Injunction is not of right but of grace; and to move an upright chancellor to interpose this strongest arm of the law, he must have not a sham case, but a well grounded complaint, the *bona fides* of which is unquestioned, or capable of vindication if questioned." *Kenton v. Railway Co.*, 54 Penn. St. 454. "There is no power," says Mr. Justice BALDWIN, "the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case than the issuing of an injunction. It is the strong arm of equity that never ought to be extended unless to cases of great injury, where courts of law can not afford an adequate or commensurate remedy in damages." *Bonaparte v. Camden, etc., R. R. Co.*, Baldw. 218. All the cases referred to show that the court looks beyond the actual injury to con-

template the consequences, and however palpable may be the wrong, it will still balance the inconveniences of awarding or denying the writ, and adjudge as these may incline the judicial mind: *Grey v. Ohio, etc., R. R. Co.*, 1 Grant, 412; *Varney v. Pope*, 60 Me. 192; *Bosley v. M'Kim*, 7 Har. & J. 468. Even in the case of a palpable violation of a public right to the annoyance of an individual, he must show the equity which requires this summary interference as the only adequate means of obtaining justice: *Sparhawk v. Union Passenger Railway Co.*, 54 Penn. St. 401.

What is the irreparable injury which is done or threatened in this case? We can see very plainly what it is in the case of many nuisances, and the equity of this particular remedy is then very manifest. If one man creates intolerable smells near his neighbor's homestead, or by excavations threatens to undermine his house, or cuts off his access to the street by buildings or ditches, or in any other way destroys the comfortable, peaceful and quiet occupation of his homestead, he injures him irrevocably. No man holds the comfort of his home for sale, and no man is willing to accept in lieu of it an award of damages. If equity could not enjoin such a nuisance, the writ ought to be dispensed with altogether, and the doctrine of irreparable mischief might be dismissed as meaningless. A nuisance which affects one in his business is less in degree, but it may still be irreparable, because it may break up the business, destroy its good will and inflict damages which are incapable of measurement, because the elements of reasonable certainty are not to be obtained for their computation. Even in the case of unoccupied land a nuisance may threaten irreparable injury, where it is devoted in its purchase to some special use, or where the person causing the nuisance is irresponsible, and in some other cases which need not here be specially mentioned.

The land injured in this case was bought by the complainant with a preconceived purpose to force a sale of it upon the defendant. He did not want it for a homestead or for business property, but for the money he could compel the defendant to pay for it. It may be said that no one is concerned with the motives of another in making a lawful purchase, or in doing any other lawful act; and this is true as a rule, but

it is not true universally. Wherever one keeps within the limits of lawful action, he is certainly entitled to the protection of the law, whether his motives are commendable or not; but if he demands more than the strict rules of law can give him, his motives may become important. In general it must be assumed that the rules of the common law will give adequate redress for any injury, and when the litigant avers that under the circumstances of his particular case they do not, and that therefore the gracious ear of equity should incline to hear his complaint, it may not be amiss to inquire how he came to be placed in such circumstances. If a man invites an injury, he may still have his redress in the courts of law, but his prayer for the special interposition of equity on the ground that what he invited and expected was about irreparably to injure, would not be likely to trouble the judicial conscience very much if it were wholly ignored. The Supreme Court of Connecticut not long since felt compelled, under circumstances very similar to those shown by this record, to look into the motives of a corporation in making a purchase with a view to litigation, and to deny relief upon the ground that an acquisition of land for such a purpose was *ultra vires*: *Occum Co. v. Sprague Manufacturing Co.*, 34 Conn. 540. We can not say in this case that complainant had no right to buy, but we can say, as we do, that when he comes demanding strict legal rights he shall have those, but no more. He is entitled to his rights under the rules of law, but he is entitled to nothing of grace.

The land having been bought to make money from by sale, a legal award of damages for an injury to it is in furtherance of the purpose of the purchase, and therefore a suitable and a just redress. Defendant is not alleged to be irresponsible, and a jury, it is supposed, will award all that is reasonable. If complainant wants more than is reasonable, he has a right to obtain it under the rules of law, but he can not demand the aid of equity in a speculation. If, in speculative language, he has a corner in real estate, there is no greater reason why he should have the assistance of an injunction to aid his schemes than there would be if, on the produce exchange, he had effected a corner in grain. Without the writ in either case he may be the sufferer, but he suffers nothing for which dam-

ages can not compensate him. The elements of irreparable injury are entirely wanting to his case.

Our conclusion is that the circuit court gave the complainant all he was entitled to when the case was sent to a jury. The decree must therefore be affirmed with costs.

GRAVES, J.—I concur in affirming the decree.

CAMPBELL, C. J., dissenting.

It appears without doubt in this case that defendants, without color or claim of right, are keeping up a continuous series of invasions upon complainant's freehold by using a running stream as a means of transporting sand upon his bottom land in quantities sufficient to bury it. The same course of conduct defiles and silts up the stream, rendering it useless to him for any purposes of business or convenience. It is equivalent in mischief to taking away or destroying his property in the land and his rights in the water.

I can not concur in the doctrine that any one's rights of this kind are subject to judicial discretion. The rights to equitable relief, where that is the only adequate remedy, are as absolute as to legal relief. The one remedy is no more sacred than the other, and no more capable of lawful denial. If the defendants were to take possession of the land in question by putting a tenant upon it, no power would exist anywhere to deny complainant his possessory remedy. Where the same sort of wrong is done by indirect assumption of possession, so that all the advantages of actual possession are enjoyed by the wrongdoer without going in person upon the soil, there is no reason for denying the only remedy which can secure to complainant the future enjoyment of his own estate which would not as justly authorize the refusal of a possessory remedy in the other case. And no remedy at law is adequate for such a grievance as is here complained of, because no legal remedy can secure complainant the use of his own property.

It is not claimed, and there is certainly no ground for claiming, that there is any equitable estoppel. Defendants have never acted on any belief that they had a right to do what they are doing. They have always known they were wrong-

doers, and have simply presumed on the patience of their neighbors, and neglected to purchase what they could originally have purchased if they had chosen. Neither does the proof show any very serious difficulty in the way of avoiding mischief, although I do not regard this as at all essential.

It is not denied by complainant that he purchased for speculative purposes. As every one has a right to do this if he chooses, it can not in any way lessen his claims to protection. It would be, I think, a very dangerous principle to hold, that a civil wrong can be lessened by the motives of the party injured, so long as he has done no wrong himself. The property of one man is as much entitled to protection as that of another—not because he bought it or intends to use it without selfish motives, but because it is property. Any attempt to discriminate would, in my opinion, leave private interests subject to a discretion which no man could calculate upon, and make the judicial conscience the only arbiter of every one's rights. Some courts may have acted on this notion, but it seems to me that such precedents are unjust, and are not consistent with law or equity, as we have received them under our constitutional guarantees of protection to person and property.

I think the court below should have granted a perpetual injunction as prayed.

MARSTON, J., did not sit in this case.

Affirmed.

RIVERS V. S. M. AND C. E. BURBANK.

(13 Nevada, 398. Supreme Court, 1878.)

¹ **Ditch upon public domain not enjoined.** Under § 2339, U. S. Rev. Stats., the defendants had the right of way for the construction of a ditch over the public domain, subject only to the liability of paying for all damages done by them to plaintiff's possession. And since the allegation of defendants' insolvency is fully denied in the answer, they ought not to be enjoined from doing upon the public domain what the paramount law declares they may do.

¹ *Thor v. Sweeney*, 7 M. R. 564.

Recorded surveys evidence of possession—Burden of proof. Under the statutes of Nevada, in order to make certain surveys evidence of possession, it is a condition precedent that the surveyor's certificate should be recorded within thirty days from the date of its delivery, and the burden of proof is, in this case, held to be upon the plaintiff to show that the certificates were recorded in time.

Custom in violation of statute. Constructive possession of public lands in Nevada can only be had by compliance with the Possessory Act of that State, and no custom of holding lands in direct violation of the statute will be recognized.

¹ **The rule that possession of a part is extended by construction** to the whole of lands called for in paper title does not apply to claims on the public domain held under an inoperative deed.

Laches in obtaining possession. If a party undertakes to subject to his dominion any portion of the public domain, the law will protect him in his possession, if he pursues the work of inclosing the tract with reasonable diligence; but in this case the plaintiff, having failed to show any effort on his part to subject the land to his control for a period of two years, was *held* to have shown an inexcusable want of diligence.

² **Possession of public land—Insufficient boundaries.** Plaintiff claimed to be in possession of a tract of public land, through which the defendant dug a ditch. The land was used chiefly for grazing purposes, the boundaries very imperfectly marked, and cattle belonging to strangers were allowed to graze with those of the plaintiff upon the land: *Held*, that the testimony set forth in the opinion was insufficient to show that plaintiff had possession of the land over which the ditch was dug.

Appeal from the District Court of the Eighth Judicial District, Esmeralda County.

The facts are stated in the opinion.

ELLIS & KING, and D. J. LEWIS, for appellants, who were defendants below.

ROBERT M. CLARKE, for respondent.

By the Court, LEONARD, J.

This is an appeal from an order refusing to dissolve a temporary injunction—an order denying defendants' motion for a new trial, and from the judgment. The action was brought to recover eight hundred dollars damages for an alleged trespass in digging a ditch over and upon the land described in the complaint, and running water therein. Plaintiff also

¹ *Roberts v. Wilson*, 4 M. R. 493.

² *Hess v. Winder*, 30 Cal. 349; *Post* POSSESSION.

prayed the court to enjoin the defendants from digging said ditch, from conducting water therein, and from committing any further damages upon the land described. The defendants were enjoined until further order of the court. After due notice, defendants moved to dissolve the injunction upon the complaint and answer. That motion was denied, and plaintiff obtained a verdict in his favor for one hundred and fifty dollars damages, for which sum judgment was entered against defendants, besides seven hundred and twenty-six dollars and thirty-five cents costs, and defendants were enjoined "from the construction of any ditches, and from the running of any waters over, through or upon plaintiff's said land, and forever restrained and enjoined from further damaging said premises by the digging of ditches or the running of water as aforesaid."

In his complaint, plaintiff alleges these facts only: "That since March, 1871, he has been, and still is, the owner in possession and entitled to the possession of six hundred and forty acres of land described therein; that he has a family residence upon said land, in which he and his family reside; that he has cultivated a garden and grows grass and grain upon said land; that on the tenth day of April, 1877, without plaintiff's consent and against his will, defendant forcibly and unlawfully entered upon said land and cut a ditch one mile in length across the same for the purpose of conveying water; that by the cutting of said ditch and throwing the earth from it over a portion of said land, the latter has been rendered unfit for cultivation, plaintiff's property has been injuriously affected, and his use of it obstructed, by defendants' ditch, to plaintiff's damage in the sum of \$800; that the damage being done to plaintiff's land by the digging of said ditch and the flowing of said water in and upon the land described, is irreparable; that plaintiff has been informed and believes, and so charges the facts to be, that defendants are insolvent and can not respond to him in damages for any judgment he might obtain against them; that plaintiff is without any adequate remedy at law and is entirely remediless without the equitable interposition of the court." No other facts are stated. Defendants deny all the material allegations of the complaint, and consequently all the equities, by a sworn answer. S. E. Burbank, one of

the defendants, avers that on the second day of April, 1877, he became the owner in fee, conditional, of a large portion of the land described, and over which said ditch was constructed, by purchase from the government of the United States, under an "Act to provide for the sale of desert lands in certain States and Territories," approved March 3, 1877, and that he is still the owner, in the possession and entitled to the possession, of the lands so purchased.

Counsel for plaintiff admit that the averments of the complaint in support of the injunction are exceedingly defective; but they urge that in the absence of a demurrer, they are sufficient after verdict and judgment for plaintiff, if the evidence sustains the judgment. Without deciding whether counsel are or are not correct in their conclusions as to the effect of the defective pleading, we shall assume, for the sake of the argument only, that they are correct, and shall examine the case in the light of the evidence, there being no substantial conflict as to the controlling facts. We pass the alleged error of the court in refusing to dissolve the temporary injunction, and shall consider the questions presented from two standpoints.

1. Admitting for the present that plaintiff was entitled to a judgment for one hundred and fifty dollars damage, was he also entitled to an injunction?

2. Was he, from the evidence, entitled to any damages?

There are many reasons why the first question must be answered against the plaintiff, some of which will be stated. It by no means follows that the court would have been justified in enjoining defendants after verdict for plaintiff, even though the proof had established the fact that plaintiff's legal rights in the land were superior to the rights of defendants: *Wason v. Sanborn*, 45 N. H. 171; *Thorn v. Sweeney*, 12 Nev. 254. The land in question at the time the final injunction was granted was a portion of the unsurveyed public domain. Plaintiff has never taken any step to acquire title from the government. Under such circumstances there can be no doubt that, under the act of Congress of July 26, 1866 (Sec. 2339, U. S. Rev. Stats.), defendants had the right of way for the construction of their ditch over this land, subject only to the liability of paying for all damages or injuries done by

them to plaintiff's possession. By that section the right of way for the construction of ditches and canals upon the public domain, for agricultural and other purposes named therein, is acknowledged and confirmed. There was no testimony showing or tending to show that in the construction of their ditch, or in conducting water therein, defendants interfered with, or injured, plaintiff's possession, unless he was in possession of the land itself. They did not injure any crops, fences or other improvements. The allegation of defendants' insolvency was fully denied by the answer, and there was no testimony tending to show that they were unable to respond in damages for any amount that might be recovered against them, in this or any subsequent action. Such being the case, we must presume that defendants were entirely solvent.

Upon this point, then, our case is this: Defendants are enjoined from doing, upon the public domain, what the paramount law declares they may do, when they are able to pay all damages done, or that may be done, to plaintiff's possession. It is a part of the act of Congress organizing the Territory of Nevada, that "no law shall be passed interfering with the primary disposal of the soil." The injunction in this case did, indirectly, so interfere. It deprived defendants of a right acknowledged and confirmed to them. The court could not do indirectly what the legislature was expressly prohibited from doing. Besides, the injury is not irreparable. Full compensation can be recovered in an action at law, if plaintiff has the superior title. Upon the question of damages plaintiff testified as follows: "In digging the ditch, defendants threw the earth out of it on the bank—the north bank. They also flowed water through it. With the ditch and the water, they have damaged me in a considerable sum of money. It is difficult to estimate the amount of damage. I think that, including what it would cost me to fill up the ditch, the damage is equal to the amount named in the complaint. Don't think I could fill it up for less than a thousand dollars. I consider it a continuing damage as long as the ditch is there. * * * The water in the Burbank ditch is a damage to my ranch, in addition to cutting it up and making it more difficult to farm. It will cause willows to grow along the bank of the ditch after a time. That

has been the effect produced by the West Walker river ditch."

T. B. Smith, a witness for plaintiff, testified that "he thought the ditch was a damage to plaintiff's land; that if he owned the land he would not have the ditch run over it for considerable money." Defendants testified that they were in great need of the water; that they had no other source from which they could obtain water for irrigating their land; that if they were deprived of its use, their crops would be entirely and hopelessly destroyed, and that they would be damaged thereby several thousand dollars in one season.

The above is all the testimony upon the question of damage. The ditch was completed, and the water turned in and kept running, some time before the preliminary injunction even. At the time of the final injunction, the only act done, or to be done by defendants, was the running of water in a completed ditch, through an open, unoccupied, uncultivated portion of the public domain, used only for grazing purposes by plaintiff, and others who had no claim to it. If the digging of the ditch damaged plaintiff, such damage was complete before defendants were enjoined. The only possible future damage that could have been anticipated, was such as might result from keeping the ditch in repair, and running water therein, through an arid country that must be irrigated by artificial means before any kind of crop can be produced. There is no testimony that any injurious result will follow from the running of water in the ditch, except that it will cause willows to grow upon the banks. Whether such growth will be an injury, and if so, how much, or a benefit, does not appear. At any rate, admitting for the present purpose, that plaintiff's rights are superior to defendants', it is apparent that his injury, on account of the running water, is but trifling in comparison with defendants' losses, if they are deprived of its use. The preliminary injunction should have been refused, because the complaint was insufficient to justify it; but having been granted, it should have been dissolved on defendants' motion, and a final injunction should have been denied after verdict for plaintiff: *Thorn v. Sweeney*, 12 Nev. 254.

We now come to the inquiry whether, upon the undisputed

facts of the case, plaintiff was or was not entitled to recover damages in any sum. The answer first depends upon the result of another inquiry, to wit: At the time of the alleged trespass did plaintiff have such title or possession as entitled him to maintain this action for injury to the land itself? If he did not, the condition of defendants' title is a matter of no consequence.'

As in ejectment, a rightful possession in the plaintiff is sufficient to enable him to maintain this action: *Rogers v. Cooney*, 7 Nev. 217.

In *Staininger v. Andrews*, 4 Nev. 66, this court said: "There seem to be but two methods in this State of acquiring title sufficient to maintain ejectment to public lands not surveyed or brought into market by the general government, and these are: First. By a compliance with requirements of 'An Act prescribing the mode of maintaining and defending possessory actions for public lands in this State' (Laws of 1864-65, 343); and, Second. By actual possession or occupation of such land." In pursuing our inquiry as to the plaintiff's rights we need not consider the effect of a compliance with the desert land law, because he claims no rights under that.

At the trial plaintiff offered, and the court admitted in evidence, two certificates of survey, known as the Hall & Simpson survey, made April 29, 1864, and the Mitchell & Fuller survey, made on the preceding day, which covered the land occupied by defendants' ditch. They were made under the tenth and thirteenth sections of the statute of 1861, 267, entitled "An Act to regulate surveyors and surveying," which sections were repealed March 9, 1865. (Stat. 1864-65, 344.)

The certificate to the Hall & Simpson survey was made June 10, 1864, but it was not recorded or filed for record until November 22, 1865. The certificate to the Mitchell & Fuller survey was made June 19, 1864, but was not recorded, so far as the record shows, until April 9, 1877; that is to say, the only proof before us that it was ever recorded, is a certificate of the county recorder, dated on the day last named, to the effect that a certain paper marked "Exhibit B" is a true and correct copy of the description and plat of

the survey of land made for Mitchell & Fuller as appears of record * * * in his office.

Sections 10 and 13 of the statute of 1861, before referred to, read as follows:

"SEC. 10. Each county surveyor shall, within thirty days after completing any survey, make out a copy of the field notes and plat, and transmit one to the surveyor-general, and give a certificate of such survey to the person for whom it was made; * * * and such certificate, provided the same shall be recorded in the county record within thirty days after the delivery of such certificate, shall be evidence of the title of possession to the person or persons holding the same.

"SEC. 13. Such survey so made, except in cases of mining claims, shall be evidence of possession for one year from the date of record of such survey."

The court instructed the jury as follows: "The presumption of the law is, that the plat of survey of Mitchell & Fuller's tract was filed within the time required by law, there being no evidence to the contrary."

It will be noticed that sections 10 and 13 were repealed before the Hall & Simpson survey was recorded, and there is no evidence showing that the Mitchell & Fuller survey was recorded before their repeal; also that the former was not recorded until long after the sixty days next succeeding the date of survey; and presuming the surveyor did his duty, that it was not recorded until long after the thirty days next succeeding the date of its delivery to Hall & Simpson. And to say the least, there is no proof that the Mitchell & Fuller survey was recorded within the time prescribed by the statute. Section 10 made the doing of certain acts, therein stated, evidence of possession, but the recording of the surveyor's certificate within thirty days from the date of its delivery, was made a condition precedent to its becoming such evidence. The burden of proof was upon plaintiff to show that they were recorded in time. The law may presume that the surveyor did his official duty and delivered his field notes, plat and certificate in time; but it does not presume, in the absence of proof showing such facts, that either Hall & Simpson, or Mitchell & Fuller filed them for

record, or that they were recorded, within thirty days after delivery to them.

The court also admitted in evidence a deed from Hall & Simpson to Frank Hall, and another from the latter to plaintiff, conveying the land described in the Hall & Simpson survey. These deeds were offered "for the purpose of showing title in the plaintiff from Hall & Simpson, through and under the survey offered, and to connect plaintiff with said survey for the purpose of showing title under the same." Both deeds were acknowledged before the Hall & Simpson survey was recorded and long after the sixty days next succeeding the survey had expired. At the time the deeds were acknowledged, as well as at the time of the trial, the survey and the certificate thereto were not evidence of possession under the statute, and consequently the deeds were not admissible for the purposes stated. The deed from Mitchell to plaintiff, offered for the same purpose, was, for the same reason, inadmissible for such purposes. Plaintiff testified that until 1874 or 1875, there was but little of the land in Smith's valley actually inclosed; that the farmers of the valley herded the stock off of their land during the growing and harvesting seasons; that they had an understanding to that effect, and that it was a custom among them; that they also recognized and respected the boundaries of each other's farm, regardless of the fact that they were not inclosed, and regardless of the fact that such boundaries were not particularly marked. The testimony just stated was admitted against defendant's objection, and the jury were instructed "that in determining the fact of possession they were entitled to consider the character and location of the land, the acts of the claimant, and the improvements made upon the land, and any well known and recognized custom at the time prevailing in Smith's valley, and known to and acted on by the parties, as to the manner of claiming and holding land by possessory title merely, and as to the construction of fences and marking of boundaries of land."

They were further instructed that "if they believed from the evidence that prior to 1875 it was a universal custom, well known and recognized among the residents of Smith's valley, to claim and hold land by possessory right without

inclosure or fencing the same, and that defendants and plaintiff knew of such custom and recognized it, and claimed and held their lands under such custom; and that plaintiff occupied and claimed the land in question under such custom; and that afterward, and about that time, the residents of said valley commenced to inclose and fence their lands; and about that time, and before defendants made any claim to the land or ditch, the plaintiff commenced to inclose and fence the land in dispute, and since then has distinctly completed marking the boundaries of said land, and has partly inclosed said land, and has with reasonable diligence prosecuted the work of fencing and inclosing the same, then the jury must find for the plaintiff. In deciding the question of reasonable diligence, the jury are entitled to consider the situation and character of the land and the ability and means of plaintiff."

It was proper for the court to admit any testimony tending to show that it was unnecessary to inclose the land in question; as, that in accordance with a custom universally acquiesced in, stock was herded by the owners during the growing and harvesting seasons: *Courtney v. Turner*, 12 Nev. 350.

But testimony, showing that the farmers of the valley recognized and respected the boundaries of each other's ranches, notwithstanding no boundaries were fixed or known and although there were no inclosures, was inadmissible; and all instructions were erroneous which informed the jury that they might consider any well known and recognized custom, known and acted on by the parties, as to the manner of claiming and holding land by possessory title.

Trespass is an action for injury to plaintiff's possession. The possession necessary as to public lands may be actual or constructive. If it be the former, in order to recover, he must show that he has performed such acts as are necessary in order to subject the land to his dominion and control—such acts as are essential to its beneficial enjoyment.

Constructive possession of such lands can be had only by a compliance with the possessory act of this State. An agreement or custom among the farmers of Smith's valley prior to 1875, that they would respect the boundaries

claimed by each, notwithstanding no boundaries were fixed or inclosures made, and that each might claim and hold by possessory title without taking the steps required by law, did not take the place of acts requisite in order to constitute constructive possession; nor did such agreement or custom excuse the failure to perform what was necessary under the law to constitute such possession. It was an effort to hold public land by constructive possession, against the very terms of the statute, which declares that "no person shall be entitled to maintain any such action for possession of, or injury to, any claim, unless he or she occupy the same, and shall have complied with the provisions of the third and fourth sections of this act." Stat. 1864-5, 343.

Although plaintiff did not attempt to show a compliance with the possessory act last referred to, he still urges that his possession and title are ample to maintain this action against defendants, for the following reasons: 1. Because plaintiff resided upon the land, cultivated twenty acres in alfalfa, and three acres as a garden; had a part actually inclosed with a substantial fence—that is to say, the twenty-three acres just mentioned, and held title of record to the whole, which extends his possession to the limits of his claim as defined by his deeds. 2. Because until 1874 the land was claimed and held under a general custom universally prevailing and recognized in the neighborhood, and after the custom ceased he proceeded with reasonable diligence to inclose his land with a substantial fence. 3. Because the land was sufficiently inclosed, and the boundaries marked, to create a possessory right.

We shall consider these three reasons in the order stated. The first is not good for the reasons given in *Wolfskill v. Malajowich*, 39 Cal. 280, and in *Eureka M. Co. v. Way*, 11 Nev. 182.

In answer to the second we shall add nothing to what has been said as to the effect of the custom or agreement between the ranchmen. But if it should be admitted that until 1874 or 1875 such custom supplied the place of actual or constructive possession, still the testimony would not show that subsequent to that date plaintiff either subjected the land over which the ditch was constructed to his dominion and

control, or that he proceeded with reasonable diligence to do so. Under this head we content ourselves with the statement, that plaintiff did not have actual possession at the time of the alleged trespass, and shall defer an examination of the testimony upon the point until we consider the third reason above stated. It is necessary, however, to consider the claim that he proceeded with reasonable diligence to subject the land to his control. It being true that at the time of the alleged trespass the land was not in the actual or constructive possession of plaintiff, the burden of proof was upon him to show that he had proceeded with reasonable diligence in an effort to acquire such possession, and in the absence of such proof, diligence can not be presumed. Upon this point plaintiff testified as follows: "The fence on the south and west sides of the Hall & Simpson tract was sold by me soon after I bought it, in 1865; soon afterward the old house or cabin was also taken down and hauled away. in 1865; no buildings were ever afterward put upon the Hall & Simpson tract; the land was never inclosed afterward until about two years ago. I then began to inclose the remaining portion of the two tracts; * * * I hauled some posts and began to set them for the purpose of making a wire fence; I dug the post holes along the south side of the ranch from the alfalfa field to the southwest corner of the Hall & Simpson tract, and from said corner northerly to a point intersecting Dobe Smith's ranch; I set up some of the posts, but not all of them; did not set any posts for a year or more prior to this controversy; about the time when they were constructing the ditch I was setting posts along the western boundary of my six hundred and forty acres, to and across the course of the ditch; * * * I have been fencing my land as fast as I could for the past two years; I was not able to have any help, and had to do the work myself; there were posts set up on my west line north of where the defendants dug their ditch. Some of the posts had been broken down since they were set two years ago; those that had been broken down or displaced had not been replaced; there was probably a quarter of a mile on the west side, where the posts had not been set up; the posts were on the ground; they were hauled there two years ago and the post holes dug; * * * no crop of any kind had been cultivated on the Hall

& Simpson tract since 1865, and no crop had been grown or harvested upon any of the land outside of the alfalfa field and garden since 1871, except that I turned some water out of my ditch on the land to make the wild grass grow upon it; I also sowed some timothy seed on the land among the sagebrush, so as to fit the land for grazing purposes; other people's cattle, as well as my own, grazed upon the land, when there were any in the valley; it was too much trouble and would not pay. to herd them off; * * * there were several reasons why I did not cultivate the whole of the six hundred and forty acres; I did not have water enough; I was too poor to hire help to grub out the brush, inclose the land and put in crops; I found it necessary to hire out sometimes in order to make a living for myself and family; I have a wife and one child; * * in 1876 I farmed in Mason's valley, in this county; no one worked on my place except what my wife did; she resided on the place in Smith's valley during my absence, and worked the garden and tended to the alfalfa field."

T. B. Smith testified for plaintiff, that "the latter had lived on the Rivers ranch since 1870 or 1871; that he had been away part of the time working for wages; that he supposed he did not fence his ranch because he was too poor."

The above is all of the testimony of plaintiff, showing diligence, subsequent to the time the post holes were dug, and a part of the posts set, two years or more prior to the alleged trespass.

Defendants' testimony accords with plaintiff's. They testified that "after the placing of the posts two or three years ago, Rivers did nothing more to reclaim the land outside of the field and garden, until this spring (1877), when he grubbed out the sagebrush from eight or ten acres next west of the field, and about seventy rods southerly from the ditch; the posts have never been connected by any boards, wires or anything else so as to make a fence. When we were digging the ditch, Rivers set up a few posts on the west side of the six hundred and forty acre tract—probably twenty in all."

We have stated all the testimony tending to show diligence; and in our opinion, instead of showing that he proceeded with reasonable industry to subject the land to his control, by the prosecution of such work as was necessary to its complete en-

joyment, it plainly shows an inexcusable want of diligent labor. True, plaintiff testified that he inclosed the land as rapidly as he was able; but he stated no single act or effort of his in aid of such result, for a period of two years or more. He did not even keep the posts standing that had been set. He did not make an additional mark upon what he now claims as his boundary line, during that long period of time. At the trial he did not know where his boundaries were, except from the records of the surveys, and he admitted that when he set his posts he did not follow the lines of the surveys. In 1876 he left the land and cultivated another ranch in another valley. He went to California during the two years, and was absent about four months. It is said that he was poor and unable to inclose the land. If he was unable to employ help, that fact would excuse him for not hiring, but it does not excuse him for not being diligent himself. If a man is poor, he should claim no more of the unsurveyed public domain than, within a reasonable time, he can subject to his dominion; then, if he diligently pursues his work, the law will protect him, although, if ejected, he may not be able to show that he has secured an actual possession: *Staininger v. Andrews*, 4 Nev. 70.

We now come to the third reason stated above in support of the claim that plaintiff's possession was sufficient.

That an inclosure was necessary, subsequent to 1874, whether the land was used for agricultural or grazing purposes, is evident; and that in the absence of a proper fence it was not subjected to the will and control of the plaintiff is equally certain. As we have seen from plaintiff's testimony, other people's cattle grazed upon the land whenever there were any in the valley; and there is no proof that the custom of herding off the stock has existed for two years or more. S. M. Burbank testified that "the land claimed by plaintiff, for the last ten or twelve years had been used as a common for grazing purposes, without any objection being interposed that he ever heard of," and his testimony was not disputed.

We do not deem it necessary to follow the witnesses in their description of the boundaries marked, the posts set, etc. It was not claimed that there was an inclosure of any portion of the land upon which the ditch was dug. On the south

side of the two tracts, posts, two rods apart, were set in 1874 or 1875. On the west side post holes were dug the entire distance; posts were set a part of the way, and were scattered upon the ground throughout the remaining portion of that side. On the west side many of the post holes had been filled by gravel, and for a long distance north of the ditch there were few, if any, signs of a marked boundary of plaintiff's claim. From the northeast corner southerly there was a distance of forty rods with no boundary line, except a ditch belonging to defendants, while the next forty rods southerly had no boundary but a public road. Throughout the whole eighty rods just mentioned, there was not a post hole, post, or fence of any character.

T. B. Smith, a witness for plaintiff, testified that plaintiff had posts set up and post holes dug, and ditches, to mark the boundaries; that the lines could be easily distinguished by these marks. But upon cross-examination he stated that he did not know the boundaries; that he had been over it very little; never saw or looked for any monuments; had never been around the six hundred and forty acres, and could not say how far it was inclosed, except the field and garden; had seen a few posts at the west end; did not know how far the east end was marked by posts, monuments or fences other than the willow fence around the garden and field; that the land along the course of the ditch, though once cultivated, was then overgrown with sagebrush, greasewood and rabbit brush, and bore a strong resemblance to the outside lands; that the brush was not quite as large, though much of it was two feet high.

In my opinion the testimony would not have justified a verdict for plaintiff had the ground been timber land and the action been trespass for cutting and carrying away timber therefrom: *Eureka M. Co. v. Way*, 11 Nev. 174. In such a case, it is established that an occupation within boundaries so clearly marked and defined as to notify strangers that the land is taken up or located is all that is necessary: *McFarland v. Culbertson*, 2 Nev. 282; *Eureka M. Co. v. Way*, *supra*. In the last case the court says: "Without here entering into the details of the testimony, it may be stated in general terms that for more than a quarter of a mile on the

south line, between the bluff of rocks and the summit of the mountain, there are no blazed trees to designate the boundary, and for a distance of one thousand two hundred and sixty feet from the southwest corner, along the western line, over a smooth, grassy plot, there is no monument, tree or anything else to mark the line (p. 175). * * * That natural boundaries, when taken in connection with artificial, are sufficient to mark the boundaries of timber land, will not be disputed; but the artificial boundaries must be made in such a manner as to clearly mark and define the line, and must connect with the natural boundaries in such a way that any person going upon the land could, by following the marked lines, tell the precise extent of the land located and claimed, and the claimant must be an actual occupant within such boundaries" (p. 182). And on page 176 it is said: "In the absence of a perfect inclosure, it is certainly essential that the boundary lines should be so clearly marked and defined that the same could be readily traced, and the extent of the claim easily known, and no stretch of the imagination could be so extended as to authorize any court to hold that the boundary lines were so marked and defined around the land in question. How could a stranger, crossing the smooth, grassy spot, designate the boundary? There is no fence, no string of brush or felled trees, no mark or monument for a distance of a quarter of a mile. Almost the same condition of the boundary is found on the south line, between the bluff of rocks and the southwest corner. A stranger in entering would discover no visible signs of any designation of boundaries whatever. The law does not require speculation upon these points. The acts necessary to clearly mark the boundaries must be done in order to notify strangers that the land is located. Otherwise any person would have as much right as the claimant to enter upon the land, cut the wood and timber thereon and take the same away."

But the land in this case is not timber land, and requires more than a marking of the boundaries before it can be said to be subjected to the dominion of plaintiff. For a period of two years prior to the alleged trespass, it could have been put to no exclusive, valuable use by plaintiff without inclosing it. It is not pretended that he did have its exclusive use for

any purpose. It follows that plaintiff did not have possession of the land over which defendants dug their ditch, and consequently that he was not entitled to recover damages in any sum.

The injunction is dissolved, and the judgment and orders appealed from are reversed.

Reversed.

BLAISDELL ET AL. V. STEPHENS ET AL.

(14 Nevada, 17. Supreme Court, 1879.)

¹ **Flooding ditch—Defendants jointly enjoined though not jointly responsible for damages.** The owners of a drain ditch recovered a judgment for damages against the several owners of distinct parcels of land, in an action for the wrongful flowing of waste water from such land, to the injury of the ditch, and also obtained an injunction which bound the defendants to so regulate the irrigation of their lands as not materially to injure the drain ditch of plaintiffs below their respective lands: *Held*, on appeal, that a motion for nonsuit ought to have been sustained on the ground that where two or more parties act, each for himself, in producing a result injurious to plaintiffs, they can not be held jointly liable for the acts of each other; but also: *Held*, that if the plaintiffs would remit their judgment for damages, the decree ordering an injunction should remain.

² **Easement to drain lands may not be abused.** "The owner of upper lands who has for more than five years enjoyed the undisputed privilege of running the waste waters used from artificial sources for the purpose of irrigating his land," does not thereby acquire an easement by prescription to run the same over the lower lands in such unreasonable manner as to damage a drain ditch constructed on the lands below.

Appeal from the District Court of Washoe County, Second Judicial District.

R. M. CLARKE, for appellants.

THOMAS E. HAYDON and BOARDMAN & VARIAN, for respondents.

By the Court, HAWLEY, J.

¹ *Chidester v. Cons. Ditch Co.*, 59 Cal. 197; *Hillman v. Newington*, 57 Cal. 56.

² *Woodruff v. N. Bloomfield Co.*, 1 West C. R. 183; 18 Fed. 753; *Hobbs v. Amador Co.*, 4 West C. R. 523.

The plaintiffs, as owners of a drain ditch constructed in 1876, brought this action to recover damages against defendants for wrongfully flowing waste water from their lands to the injury of plaintiffs' ditch, and for an injunction to restrain such wrongful flowing of waste water. At the close of plaintiffs' testimony the defendants moved for a nonsuit upon the ground, among others, that it did not appear that the injury complained of "was the result of the joint or concurrent act of the defendants." This motion was overruled. The cause was tried before a jury to whom special issues were submitted. The jury answered the special issues, and also found a general verdict in favor of the plaintiffs, assessing the damages at fifty dollars. Both parties moved for judgment upon the special issues found by the jury. The court gave judgment in favor of the plaintiffs, and the defendants appeal.

From the issues found by the jury it appears that the "waste water from the defendants' lands and irrigating ditches" did flow into plaintiffs' drain ditch, and that the waste water from the lands and irrigating ditches of Henry Weston and Mary Wall also flowed into plaintiffs' drain ditch. The waste water from the lands and ditches of the defendants has flowed upon the land drained and intersected by the drain ditch of plaintiffs ever since 1864. With the exception of the eighth day of May, 1877, no more waste or drainage water flowed from the lands and ditches of the defendants than in previous years. The defendants "own, occupy and irrigate separate and distinct tracts or parcels of land, each in his own right." They have no drain ditch which they use together in common. The defendant Sessions in 1876 constructed a drain ditch leading from his land to the Truckee river of sufficient capacity to carry, and it did carry, all the waste water brought or used by him on his land with the exception of the eighth day of May, 1877.

The jury failed to find whether the defendants, or either of them, used any more water upon their land than was proper and necessary to irrigate the same, but did find that each defendant used proper and reasonable methods of irrigation. The plaintiff Henry Stephens had dams across the slough or channel, in which waste or surplus water from the lands of defendants flowed, and turned the water out upon his lands to irrigate the same. The grantors of the plaintiff

Henry Stephens appropriated, claimed and used the waste water flowing from the lands of defendants for irrigating purposes. The plaintiff Pine, upon the land of the plaintiff Blaisdell, used the waste or surplus water flowing from the lands of Henry Stephens, for irrigating purposes. The waste water flowing from the lands of defendants flowed upon the lands of the plaintiff Henry Stephens, in a natural channel or slough, and he turned the water out of said channel upon his land. The waste water flowing from the lands of defendants, after passing over the lands of the plaintiff Henry Stephens, flowed into an artificial ditch constructed upon the lands of the plaintiff Blaisdell, and thence into the drain ditch of the plaintiffs. The plaintiffs' ditch was damaged to the extent of seventy-five dollars.

The jury did not know how much it was damaged by the water flowing from the lands of Mary Wall and Henry Weston, but found that it was damaged fifty dollars by the water flowing from the lands of defendants and twenty-five dollars by the "waste water flowing from plaintiffs' lands."

It does not appear from the evidence that the defendants acted in concert, or that the act of either in any manner produced the act of the other.

We are of opinion that the motion for a nonsuit ought to have been sustained.

The general principle is well settled that where two or more parties act, each for himself, in producing a result injurious to plaintiff, they can not be held jointly liable for the acts of each other: *Ferguson v. Terry*, 1 B. Mon. 96; *Partenheimer v. Van Order*, 20 Barb. 479; *Guille v. Swan*, 19 Johns. 381; *Bard & Wenrich v. Yohn*, 26 Pa. St. 482; *Little Schuylkill Navigation Railroad and Coal Company v. Richards*, 57 Id. 142.

The case last cited is certainly analogous to the case at bar. There the suit was brought for damages to a dam filled by deposits of coal dirt from different mines on the stream above the dam, and the plaintiffs ought to hold the defendant liable for the whole damages caused by the deposits. Speaking of the results that would follow if the defendant was held liable for the acts of others, the Supreme Court say: "It is imma-

terial what may be the nature of their several acts, or how small their share in the ultimate injury. If, instead of coal dirt, others were felling trees and suffering their tops and branches to float down the stream, finally finding a lodgment in the dam with the coal dirt, he who threw in the coal dirt and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot, and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream; this is the tort, while the deposit below is only a consequence. The liability, therefore, began above with the defendant's act upon his own land, and this act was wholly separate and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterward became joint, because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream, his dirt filled only its own space, and it was made neither more nor less by the accretions." In this case the right of action arises, if at all, upon the act of allowing the waste water to run into the slough from the land of the defendants. This is the tort. The damage to the drain ditch below is only a consequence. The act of defendant Sessions, in allowing the waste water to run from his land, was separate and independent from the act of defendant Stephens, in allowing the waste water to run from his land, and neither of them could be held liable in damages for the wrongful acts of the other.

The judgment of the district court is reversed and the cause remanded for a new trial.

RESPONSE TO PETITION FOR REHEARING.

By the Court, HAWLEY, J.

A re-examination of all the testimony contained in the

transcript strengthens the convictions expressed in the former opinion, that "it does not appear from the evidence that the defendants acted in concert, or that the act of either, in any manner, produced the act of the other." This being true, it follows, for the reasons stated in our former opinion, that the action at law can not be sustained as against both defendants. A rehearing was granted, principally upon the ground that—conceding the correctness of the views expressed in the opinion—it might not necessarily follow that the nonsuit should be granted as against both defendants. The plaintiffs might have the right to dismiss as to one of the parties and proceed against the other. This question, however, has not been relied upon by the respondents.

We are asked to decide the equitable rights of the respective parties, and determine whether or not, upon the facts disclosed in the record, the plaintiffs are entitled to an injunction.

The respondents admit, as the authorities declare, that the owner of an upper tract of land has an easement in the lower tracts to the extent of the natural flow of water from the upper to, and upon the lower tract of land.

It is unnecessary to discuss the important, delicate and interesting questions that, under the improved methods of irrigation and improvement of agricultural lands, are liable to be raised as to the general right of the owner of an upper tract of land to flow the waste or surplus water used for irrigation from artificial means upon the lower lands of his neighbors. So far as the present case is concerned, it only presents the single question, whether the owner of the upper land, who has for more than five years enjoyed the undisturbed privilege of running the waste waters used from artificial sources for the purpose of irrigating his land, thereby acquires an easement by prescription to run the same over the lower lands in such unreasonable and unnatural quantities as to damage a drain ditch recently constructed by parties owning land below him, for the purpose of carrying off such surplus or waste water, as well as the waste water used in irrigating their own land.

The jury found, as stated in the former opinion, that, with the exception of the eighth of May, no more water flowed from defendants' lands than in previous years, and although

they failed affirmatively "to find whether the defendants, or either of them, used any more water upon their land than was proper and necessary to irrigate the same," yet their other findings would seem to imply such to be the fact. But, be that as it may, the court, in its judgment and decree, did expressly find that, on the eighth of May, the defendants did allow an "inordinate quantity" to flow down over plaintiffs' lands. There is ample testimony to sustain this finding.

Under the decree the defendants are permitted to irrigate their lands by all reasonable use of the waters and by all convenient methods or systems of irrigation, and are only bound to so regulate the enjoyment of this right "as not to materially injure the drain ditch of plaintiffs below their respective lands."

We are of opinion that upon the facts disclosed by the record the plaintiffs are certainly entitled to the injunction as decreed by the court. Upon a review of the questions involved in this case we are also of the opinion that respondents should be allowed, within fifteen days after the filing of the remittitur herein, if they so desire, to remit the judgment for damages, and if so remitted then the decree ordering an injunction should remain. Otherwise a new trial must be granted.

The judgment of the district court, in so far as it awards damages against the defendants, is reversed, and the cause remanded for such further proceedings as are indicated in this opinion would be proper.

The costs of this appeal to be taxed against respondents.

**¹THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
ET AL. V. THE STANDARD OIL COMPANY ET AL.**

(33 New Jersey Equity, 127. Court of Chancery, 1880.)

Oil pipe line over railroad track—No injunction against nominal trespass to aid a competing oil carrier. The Central Railroad Company purchased the fee simple title to a tract of land in Bayonne. The railroad track was laid across the land in a cut sixteen feet deep; the city subsequently condemned a street across the cut, and a bridge

¹S. C., 7 M. R. 628; *United R. R. v. Standard Co.*, 7 M. R. 625.

CENTRAL R. R. CO. V. STANDARD OIL CO. 605

was built over it by the company, though paid for by the city. Subsequently the city granted, by resolution, to the Standard Oil Company the right to lay pipes in the street. The oil company laid its pipes, not only in the street, but alongside of the bridge, and on a level with it. The railroad company applied for a preliminary injunction to prevent resistance to the removal of the pipes along the bridge, which was refused, because,

1. The pipes had been laid when the bill was filed.
2. The case presented did not show a threatened infliction of irreparable injury.
3. The claim that the pipes were supported by the bridge, and thereby imposed upon it an unwarranted servitude, is denied by the oil company, and is, at most, a subject of dispute.
4. The complainants have no claim to protection against lawful competition in the transportation of oil.
5. The defendants do not appear to have been actuated by disregard of the power of the court.

Bill for relief. On bill and answer and affidavits. Order to show cause why injunction should not issue.

B. WILLIAMSON and B. GUMMERE, for complainants.

R. GILCHRIST and A. P. WHITEHEAD, of New York, for defendants.

Chancellor RUNYON.

The Central Railroad Company of New Jersey became the owner, by purchase, of a tract of land which it bought for the purposes of its road and business, and over which its tracks were laid through the city of Bayonne. When it bought the land, it took title in fee. Streets had been, by due authority, laid out over it by mapping. It built its road over it, and at the place where Thirteenth street, as laid on the map, crossed it. The road was constructed in a cut. The city subsequently took by condemnation part of the land of the railroad company for that street. A bridge was necessary at the crossing over the railroad, which at that place was about sixteen feet below the grade of the street. The railroad company built the bridge, but was allowed for the cost of it in the assessment upon it for the benefits of the street to its land not taken. By its charter it was bound, as is now claimed in its behalf,

to build the bridge. After the bridge was built, the Standard Oil Company, a foreign corporation, obtained permission (granted by resolution) from the city to lay pipes in the street. The pipes were to be part of a line which it proposed to lay for a conduit for oil from the Erie railroad, at Snake Hill, in Jersey City, to the oil company's works at Constable's Hook in Bayonne. It neither obtained nor asked for any permission, either of the railroad company or of the receiver thereof, appointed by this court on proceedings in insolvency, who was in possession of and operating the road under the order of this court, and it had no authority from the legislature in the premises; but claiming or acting on the assumption that the bridge was part of the street, and neither having nor professing to have any authority except that derived from the municipal authorities of Bayonne, it laid pipes (six inches in diameter) at and alongside of the bridge, but, as it insists, not supporting them thereon or thereby, and when the bill was filed it maintained, or was in the attitude of maintaining the pipes there, by forcible resistance against the receiver of the railroad company. The complainants, the railroad company and the receiver, invoke the protection of this court against this action of the oil company in laying and maintaining the pipes, and to that end ask for a preliminary injunction. They base their claim to this relief on the ground of irreparable injury, insisting that the oil company had no lawful authority to lay the pipes, because, as they urge, in the first place, the city could give it no right to do so, and, in the next place, if the city had the power, it could not give the authority by resolution, but must do so by ordinance; and further, that the oil company is unlawfully and by mere usurpation imposing upon the bridge, which the railroad company claims to own, or the place where the pipe is laid, a servitude at once unauthorized, inconvenient and dangerous, and an unwarrantable invasion and usurpation of the rights and property of the railroad company and that, too, for the purpose of enabling the oil company to compete with the railroad company in the exercise and enjoyment of its franchise in the transportation of oil for tolls over its road, or at least to deprive it of tolls which it would otherwise get (and to which it has a right) by such transportation.

It is also urged that the action of the defendants in digging through the abutments of the bridge, and laying the pipes without permission of this court (in whose hands, as before-mentioned, the railroad company's property and affairs were and are), was a contempt of court, and ought to be characterized and dealt with accordingly.

The oil company on the other hand, insists that the municipal government had authority to empower it to lay the pipe in the street, and it contends that the bridge is part of the street, and in this connection it further claims that the city, under its charter, by the condemnation proceedings, acquired the fee of the land taken from the railroad company for the street, and not merely a right to use it for the purposes of a highway.

The railroad company was, by its charter, when it built the bridge, bound to "construct and keep in repair good and sufficient bridges or passages over or under its railroads where any public or other road should cross them, so that the passage of carriages, horses and cattle should not be impeded thereby" (P. L. of 1847, p. 133, § 9), and the complainants insist that the bridge was built by the railroad company under its statutory obligation to construct and maintain it. But it appears that, though built by it, it was, in fact, paid for by the city, and the defendants claim that therefore it is to be regarded as the property of the city, and, as such, subject to its use as part of the street, for reasonable, lawful municipal servitudes and uses. They also claim that the city, by the condemnation, obtained a right to use the air space above the railroad for such purposes.

The city, by its proceedings for opening the street, condemned land crossing the railroad to the full width of the street. The street appears to be of the width of eighty feet, of which forty-eight are devoted to travel by vehicles and the rest to use as sidewalks. The bridge is of the width of fifty feet. If the city is to be held to have acquired by condemnation only the right to a convenient crossing for travel, obviously it must be held to have acquired nothing more than the railroad company was, by its charter, bound to furnish.

The defendants, as before stated, insist that, by the condemnation, the city acquired a fee in the land condemned.

By the original charter, which was granted in 1869, (P. L. of 1869, p. 398), it was provided that on condemnation the land should vest in the city, and by the supplement (approved March 28, 1873,) to the act revising the charter, (P. L. of 1873, p. 469,) it was enacted that, on condemnation, the fee simple should be vested in it, and the defendants claim that, notwithstanding the proceedings for condemnation were begun before the passage of the latter act, yet it, by relation back, gave the city a fee in the land condemned. But apart from the obvious question raised by the mere statement of this claim, it is to be remarked that the claim to a fee in the land in question is in direct contrariety to the adjudication of the Supreme Court in *N. J. Southern R. R. Co. v. Long Branch Comm'rs*, 10 Vr. 28, in which it was held that a municipal corporation under a condemnation for a street across a railroad track, acquires only a right of way; and according to the doctrine of that case, the contrariety would still exist, though it be conceded that the provision of the supplement of 1873, before referred to, though posterior in date to the beginning of the proceedings therein, applies to the condemnation under consideration.

Whether the city has the right to use the space above the railroad for any other purpose than travel by means of the bridge, is a question in dispute between the parties.

It is urged by the complainants, however, that the Supreme Court has decided that a municipality can not impose on the land taken for its streets any uses or servitudes except those sanctioned by law or custom, and that therefore it is established that the leave given to the oil company in this case, even though it had been by ordinance instead of resolution, was unauthorized.

But a still further question is raised: the revised charter of the city (P. L. of 1872, p. 686) confers power (p. 704) on the municipal authorities to regulate the manufacture and keeping of gunpowder, petroleum, fireworks and all other dangerous and combustible articles, and the defendants insist that, under this power, the city has a right, with a view to public protection, to authorize the transportation of petroleum through the city by means of underground pipes, and, to that end, to give the use of the streets, or parts of them, for the

purpose. It is enough for the present purpose to say that a question of construction is thus presented. The complainant's asserted right, on which the claim to relief by injunction is founded, is in dispute.

But if the city has neither any right, nor even any shadow of right, under its charter, to authorize the laying of the pipes, then the action of the defendants is unwarranted, and is a trespass, and equity will not interfere by preliminary injunction, in case of trespass, except where irreparable injury is threatened. It is established in this State that a preliminary injunction will never be ordered unless from the pressure of an urgent necessity and to prevent what, in equity, is regarded as irreparable damage: *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 2 Stew. Eq. 299. In that case the following language of Chancellor Williamson, the elder, is quoted with approval:

"An injunction ought not to be allowed in all cases of trespass, nor to protect persons in the enjoyment of every right. The court always, to restrain a trespasser, expects a strong case of destruction or irreparable mischief to be made out, or that the trespass should have so long continued as to become a nuisance. A perseverance in committing acts of trespass is not sufficient."

In the case *Citizens Coach Co. v. Camden Horse R. R. Co.*, the preliminary injunction complained of, the order for which was reversed, was issued to restrain the coach company from using the complainant's railroad tracks, in competition with it in the business of carrying passengers, in the exercise of its franchise. Such injury was held by the appellate tribunal not to be of a character to warrant interim interference.

This case presents no condition of circumstances demanding, by reason of the threatened infliction of irreparable injury, the intervention of this court at this stage. The pipes had been laid when the bill was filed. The allegation of danger from fire, in view of the leakage of oil from the pipes and the highly inflammable nature of the substance, is met by proof that there is no danger, and the offer to make all such appliances to protect the complainants against the possibility of injury from leakage of the pipes as this court may direct. It is suggested by the complainants that the existence of the pipes will be an ob-

struction and impediment to raising the bridge (which it is said is contemplated, and which they allege is necessary for the protection of the lives of brakemen on their freight cars), and perhaps prevent it entirely. But in that view, suffering the pipes to remain where they have been put, and permitting them to be used, can not be regarded as an irreparable injury, for this court can provide for that contingency, if need be, when occasion requires.

The oil company insists that the pipes are not supported by the bridge, and that if the bridge were removed they would still stand in place. Whether they in anywise depend on the bridge for support, is at most a subject of dispute.


But it is urged that the object of the laying of the pipes is to deprive the complainants of part of their business, and so to diminish the value of their franchise to transport goods for tolls, inasmuch as the oil company intends, by means of the pipes, to transport oil for itself, and may intend also to transport it by this means for others.

The complainants have no claim to a preliminary injunction on this ground. In the first place, the case just cited, *Citizens Coach Co. v. Camden Horse R. R. Co.*, would seem to be conclusive authority on this point. And, in the next place, they have no monopoly of transporting goods or passengers for tolls by all means whatever, and, of course, they have no claim to protection against lawful competition.

It will not be out of place to remark, though my conclusion in no wise rests upon it, that the oil company denies that it intends to transport goods for others by means of the pipe, but alleges that it intends to transport only its own goods thereby, and that, most manifestly, can not be construed into an invasion of any franchise of the complainants.

As to the imputed contempt, the defendants do not appear to have been actuated by any disposition to contemn or disregard the power or dignity of this court.

On the ground, then, that there is no necessity or ground for interim interference, and without passing upon the disputed questions, except as to the right of the complainants to monopoly of transportation by all ways or means, I am of opinion that the order to show cause should be discharged, but under the circumstances, it will be without costs.



NEWTON v. NOCK.

(43 Law Times, N. S. 197. High Court of Justice, Chancery Division, 1880.)

Lease of brick field—Mandatory injunction to restore fence. Where the lessee of a brick field, contrary to the covenants in his lease, caused the fall of one of the fences bounding the field, by excavating the clay from under it: *Held*, that a mandatory injunction in a negative form should be granted to compel the restoration of the fence to its former condition.

Covenant to work to fullest extent. A covenant in a lease binding the lessee to "get the demised clay to the fullest practicable extent consistent with the means of sale of bricks and tiles to be made therefrom," does not bind the lessee to go on working at a loss, even though a means of sale, at an unremunerative rate, might have been found for bricks made out of the demised clay.

This was an action brought to enforce certain of the covenants in a lease of a brick field.

By an indenture of lease dated the twenty-fifth of March, 1876, and made between the plaintiff of the one part and the defendant of the other part, the plaintiff demised to the defendant a certain piece of land called First Brick-kiln field, in the county of Warwick, and also all clay lying in and under the same, with full liberty to the defendant during the term to get the clay in, under, or upon the said piece of land, and make the same into bricks or tiles (with a reservation to the plaintiff of timber, mines and minerals, with liberty to enter and get them), to hold the piece of land for the term of fourteen years from the date of the indenture, paying yearly the several rents and royalties thereby severally reserved, viz., as surface rent, £21 5s. by equal quarterly payments, and as a fixed rent in respect of the clay thereby demised the yearly rent of £30, during the first seven years of the term for 300,000 bricks or tiles collectively, whether manufactured or not, and the yearly rent of £50 during the last seven years of the term for 500,000 bricks or tiles collectively, whether manufactured or not, payable quarterly, and over and above the said certain yearly rents a royalty at the rate of 2s. for every 1,000 bricks or tiles collectively over and above the several quantities of bricks or tiles previously mentioned, payable quarterly. And the de-

¹ *Cole Co. v. Virginia Co.*, 7 M. R. 503, 516.

fendant covenanted that he would pay the rents and royalties, and would get the clay from such places and in such situations on the land, and work the face of the clay regularly to such a depth and at such a level as the plaintiff should direct, and would not permit any of the clay or other materials to be carried off the premises, and would from time to time during the term work and get the demised clay to the fullest practicable extent consistent with the means of sale of bricks and tiles to be made therefrom, and would use his best exertions and endeavors to encourage and extend the sale of the same bricks and tiles to be made as aforesaid; and further, that the defendant would from time to time during the term, in the working and the getting of the demised clay, work and get the same to the fullest practicable depth, and in a fair, skillful and workmanlike manner, according to the most approved rules, and as other brickyards of the same nature in the same neighborhood usually were or ought to be worked, and fairly, without unnecessary delay, fraud, spoil, waste, or deduction, doing as little damage as might be to the surface of the said land thereby demised, and would not for the purposes aforesaid take or use more of the surface of the land than should be really necessary, nor willfully or knowingly do, commit, or omit, or suffer to be done, committed or omitted, any act matter, or thing, whereby the land should be damaged. And the said indenture also contained certain other covenants by the defendant with respect to keeping books of account and other matters.

On the 13th June, 1879, the present action was commenced.

By his statement of claim the plaintiff alleged that the sum of £233 5s. 6d. was due in respect of rents and royalties and unpaid. (This sum was, however, paid before the hearing.) The plaintiff also alleged that, in breach of his covenants, and contrary to the written directions of the plaintiff's agent and in defiance of a written notice threatening an action for an injunction, the defendant had gotten the clay from the boundary or fence separating the demised premises from an adjoining field lately purchased by the defendant, and by so doing had broken down the fence or boundary, and made a cutting between the demised premises and the said field, and

had refused to replace the clay, restore the boundary, or block up the cutting. The plaintiff also alleged that the defendant had brought clay from his adjoining field through the cutting onto the demised premises, and there burnt and made the same into bricks and tiles; also that, in breach of his covenant, the defendant had neglected to work and get the demised clay to the fullest practicable extent, or to encourage or extend the sale of the articles to be made thereout, or to work the same to the fullest practicable depth, and had been and was then working and getting the clay upon his said field in competition with and to the neglect of the demised clay. Also that, in breach of his covenant, the defendant had failed to forward to the plaintiff notices of the contents of his kilns.

The plaintiff claimed, (1) £233 5s. 6d. for rents and royalties, with interest from the date of the writ. (2) A mandatory injunction compelling the defendant forthwith to replace the clay and to restore the fence or boundary and block up the cutting. (3) An injunction to restrain the defendant from bringing on the demised premises clay gotten by him from his said field, and from burning or making the same into bricks or tiles on the demised premises. (4) An injunction to restrain the defendant from working or getting the clay in his said field in competition with or to the neglect of the demised clay. (5) A mandatory injunction compelling the defendant to forward to the plaintiff notices of the contents of the kilns.

This was the hearing of the action.

COOKSON, Q. C., and ROMER (W. BARBER, with them), for the plaintiff. Irrespective of any express covenant there is an implied covenant by a tenant not to remove boundaries or destroy fences, for such acts amount to waste. But this case does not depend solely on the general law, for there is an express covenant, and the plaintiff is entitled, not only to an injunction to prevent the further destruction of the fence, but to an injunction in a mandatory form to compel what has been removed to be replaced. The defendant has further committed waste, and that in breach of his covenants, by bringing foreign clay onto this field, and there making it

into bricks. By his covenant the defendant was bound to get the demised clay to the fullest practicable extent, but instead of doing so he has gotten no clay out of the plaintiff's field, nor made any bricks out of clay there gotten since March, 1879. On the contrary, he has used the field for burning other clay into bricks. This is an injury to the plaintiff, it matters not how small, and it is a violation of the covenant which binds the defendant to work the plaintiff's clay without containing any exceptions in the event of working at a profit being impossible. Damages then at least are due. We ask for interest on the £233 5s. 6d. They cited *Lane v. Newdigate*, 10 Ves. 192; *Lord Courton v. Ward*, 1 Sch. & Lef. 8; *Pratt v. Brett*, 2 Madd. 62; *Rochdale Canal Company v. King*, 2 Sim. N. S. 78; *Tipping v. Eckersley*, 2 K. & J. 264; *Goodson v. Richardson*, 30 L. T. Rep. N. S. 142; L. Rep. 9, Ch. 221; *Cooke v. Chilcott*, 34 L. T. Rep. N. S. 207; L. Rep. 3 Ch. Div. 694; Bainbridge on Mines, 4th Edit. 218.

NORTH, Q. C., and BEALE, for the defendant. As to the interest claimed, under 3 and 4 Will. 4, c. 42, s. 28, a claim for interest is necessary and the statement of claim is not noticed: *Ward v. Eyre*, 28 W. R. 712.

As to the mandatory injunction to compel the restoration of the fence and of the clay under it, it may be that the fence will have to be replaced, but this is not the time for it. In case of breach of contract an injunction will, no doubt, be granted, and not damages; but the issue of a mandatory injunction is a very different thing, and it is not the practice of the court to grant injunctions of this description precipitately. It is only in special cases that such injunctions are granted at all; as, for instance, where, after notice, a man deliberately builds in front of a house and blocks out the light: *Lane v. Newdigate*, (*sup.*); *Cooke v. Chilcott*, (*sup.*).

There may be cases in which, though the damage is small, yet the injury is continuing, and an injunction will be granted, as in *Ulowes v. Staffordshire Potteries' Waterworks Company*, 27 L. T. Rep. N. S. 298, 521. L. Rep. 8 Ch. 125. But this is not at all that case. The damage is trifling, and damages should be given once for all. *Isenburg v. East*

India House Estate Company, 9 L. T. Rep. N. S. 625; 3 De G. J. & S. 263, and *Senior v. Pawson*, L. Rep. 3 Eq. 330, show that an injunction will not be granted where damages are a conclusive and sufficient remedy. Moreover, a mandatory injunction must be applied for at the earliest possible moment, which was not the case here. As to the injunction asked in respect of the alleged neglect of the demised clay and the working of other clay in competition, the real question is, whether the defendant is or is not to be compelled either to keep his machinery idle or to work the plaintiff's clay at a loss. The claim for an injunction has now been abandoned and damages have been asked instead, but no relief at all can be given. There is no obligation on the defendant to work the plaintiff's clay at all. It is impossible for him to work it at a profit, for he can only work clay on which no royalty is payable at a profit of 1s. per 1000, and when a royalty of 2s. per 1000 has to be taken into account, there is a loss of 1s. per 1000. The covenant on which this claim is founded is an ingenious attempt at arriving at the same result as was aimed at in *Lord Abinger v. Ashton*, L. Rep. 17 Eq. 358, by a covenant which the Master of the Rolls called "a most unreasonable and absurd covenant," and to do what that learned judge there said could not be done. In *Wheatley v. Westminster Brymbo Coal Company*, 22 L. T. Rep. N. S. 7, L. Rep. 9. Eq. 538, MALINS, V. C. held that the defendants in that case could not be compelled to work the mine so long as the minimum rent was paid; but here not only the minimum rent has been paid, but a considerable sum in addition. The meaning of the covenant really is, not to compel the defendant to work at a loss, but to cause the working of the clay in the demised field to be carried on in the ordinary way; and this is all that the defendant can be compelled to do. Now that this clay can not be worked at a profit, the defendant is entitled to desist from working it, and to direct his attention only to the clay out of which a profit can be made.

COOKSON, Q. C. in reply.

DENMAN, J.

The result at which I have arrived is that neither party is wholly right in the contentions which he has raised. The first question is of very small importance, namely, whether the plaintiff is or is not entitled to interest on the £233 5s. 6d. for rents and royalties which the defendant has paid after action brought. The statute 3 & 4 Will. 4 c. 42 s. 28, though it does not on the face of it apply to cases where no jury has been engaged, has nevertheless been always acted on by courts of equity. The requirement of the statute for the sums to be certain is satisfied here, for the exact amount of the interest is mere matter of calculation, and *id certum est quod certum reddi potest*. The defendant must therefore pay the plaintiff the interest on the £233 5s. 6d. The next is an important question; whether what has been done to the fence was an act in violation of the agreement, and whether an injunction is to be granted in respect of this, *i. e.*, an injunction, really in the nature of a decree for specific performance, compelling the defendant to observe the contract, and restore the fence to its former condition. The result of the evidence as to what has been done is to show that the defendant has caused excavations to be made under the fence by reason of which it has fallen down. And this was done long after notice had been given by the plaintiff's agent that the defendant was bound by his covenants not to act in this manner. It was contrary to his covenants and to the law, and was done after fair warning, so that the defendant has only himself to thank for the consequences. The plaintiff is, then, entitled to the injunction he seeks, subject only to the question whether in point of form such relief can be granted. The form of relief sought has been much discussed, and I am satisfied that what is asked can be done, and that an injunction can be granted to restrain the defendant from leaving things as they are. The injunction will therefore go, and the result will be to compel the defendant to restore the fence to its former condition. The next point is as to the part of the prayer which claims an injunction to restrain the defendant from bringing foreign clay on to the demised premises and there burning it into bricks. (His lordship considered this point, and came to the conclusion that the fact of that having been done was established, and that it was contrary to the

covenant that the defendant "would not, for the purposes aforesaid, take or use more of the surface of the land than should be really necessary, nor willfully or knowingly do, commit, or omit, or suffer to be done, committed or omitted, any act, matter, or thing whatsoever, by reason or means whereof the said demised land should be damaged." His lordship held that the defendant had violated that covenant for his own purposes, and that the plaintiff was entitled to an injunction to restrain further violations.) Then I come to the fourth part of the relief sought. That is very vague, and I hardly know how to construe it, but it is not necessary to go into that, as the plaintiff is willing to accept damages in lieu of injunction. This question really turns upon the covenant that the defendant "would get the demised clay to the fullest practicable extent consistent with the means of sale of bricks and tiles to be made therefrom." If the defendant could not have performed that part of the covenant at all, because he could not have got any clay at all consistently with the means of sale of the bricks to be manufactured out of it, the question as to competition becomes immaterial, for the plaintiff has sustained no damage, if it be shown that no more could be done in the manufacture and sale of bricks than has been. Now in my opinion that covenant does not compel the defendant to work at a loss. On that point the case of *Lord Abinger v. Ashton* was cited to me. That case is not, indeed, on all fours with the case before me, but it is important as showing that in a lease somewhat of this nature it has been held that the intention was not to make a man go on working at a loss. It may well be that this covenant was intended to give the defendant, so long as he continued to pay the stipulated fixed rents, a right not to do anything more, at all events if he could not do anything more without suffering a loss. The evidence shows that during the period of operation of the covenant the weather was very bad, and that brickmaking at a royalty of 2s. a thousand could not be carried on at a profit in those parts. On this part of the case I am very strongly of opinion that no damage has been done to the plaintiff by working in competition with him, and that the defendant was not bound hand and foot to the plaintiff to go on working at a loss. That part of the claim, therefore, fails. The result will be

that I shall declare interest on the 233*l.* 5*s.* 6*d.*, to be payable at 4 per cent., from the date of the writ; I shall declare the fence to be the plaintiff's property, and restrain the defendant from continuing it as it is; and I shall restrain the defendant from burning on the plaintiff's land clay not gotten there. As to the other matters, I shall dismiss the action with costs so far as asked by paragraphs 4 and 5 of the claim. I think the most satisfactory arrangement will be to make the defendant pay two thirds, and the plaintiff one third of the general costs of the action.

Solicitors for the plaintiff, CLARKE, WOODCOCK, and RYLAND, for L. P. ROWLEY, Birmingham.

Solicitors for the defendant, W. PILCHER, for UNETT, PAGE, and FISHER, Birmingham.

STRELLEY V. PEARSON.

(Law Reports, 15 Ch. Div. 113. High Court of Justice, Chancery Division, 1880.)

¹ Injunction to prevent drowning of colliery. The court has power to enjoin a party from discontinuing pumping at a colliery and prevent its being drowned out, pending a case for specific performance of contract for lease; but it will not exercise that power when the pumping has already been a long time discontinued.

Usual covenants. Independent of special custom, a clause in a lease allowing the lessee to determine the lease when the mines demised are incapable of being worked to a profit, is not a clause usually inserted.

Practice as to settling terms of lease. On reference to chambers, to settle the terms of a lease, the court will, when convenient, make a declaration as to the insertion of a particular clause with regard to which an issue has been raised in the pleadings.

This was an action for the specific performance, by the defendant, of an agreement to take a lease of a colliery from the plaintiff. The plaintiff also claimed an injunction to restrain the defendant from permitting the colliery to be drowned, or other irreparable injury to accrue thereto, by reason of the defendant's default in performance of his part of the agreement.

¹ *Crompton v. Lea*, 6 M. R. 179.

The agreement in question was dated the 5th of August, 1873, and by it the plaintiff agreed to grant a lease to the defendant of two seams of coal, called the Blackshale and the Kilburn seams under the Oakerthorpe estate, in Derbyshire, for the term of thirty-one years, and the defendant agreed to accept the lease. It was provided that the lessee should work the mines with due diligence, and that all provisions and covenants usual in leases of collieries should be introduced into the lease. Soon after the date of the agreement the defendant was let into possession of the mines, and he continued to work them down to the 18th of April, 1879, when he ceased to raise any coal out of the Blackshale seam, and on the 29th of April he stopped pumping out the water. He had a few days previously given notice to the plaintiff of his intention to close the colliery and cease pumping.

The writ in the action was issued on the 20th of May, 1879, and the plaintiff at once gave notice of motion on the 23d of May for an injunction to restrain the defendant from ceasing pumping, and from permitting any other irreparable injury to accrue to the mine by reason of default on the part of the defendant in performing his obligations under the agreement, or for such other order as might be proper.

The motion did not come on for hearing on the 23d of May, and the hearing was afterward delayed in consequence of the cross-examination of a witness and the motion was not heard before the long vacation. The result was that the mine was drowned. Ultimately, on the 7th of November, the motion was, by consent, ordered to stand to the trial of the action.

This was the trial: The principal questions argued were, whether the costs of the motion ought to be costs in the action, and whether the lease ought to contain a proviso enabling the lessee to determine the lease in the event of its being impossible to work the mines at a profit. Evidence was adduced on both sides upon the question whether such a proviso was a usual clause.

COOKSON, Q. C., and COLT, for the plaintiff.

Even before the Judicature Act the court would have had

jurisdiction to restrain the defendant from discontinuing the pumping: *Lane v. Newdigate*, 10 Ves. 192; *Storer v. Great Western Railway Company*, 2. Y. & C. Ch. 48; *Goodson v. Richardson*, Law Rep. 9 Ch. 221; *Nuneaton Local Board v. General Sewage Company*, Ibid. 20 Eq. 127; *Cooke v. Chilcott*, 3 Ch. D. 694. At any rate there is now jurisdiction to grant such an injunction: Judicature Act, 1873 s. 25, sub-s. 8; Rules of Court, 1875, Order LII, rule 3; *Beddow v. Beddow*, 9 Ch. D. 89, 92; *Hedley v. Bates*, 13 Ch. D. 498. The injunction ought to be granted until the execution of the lease. The motion was a proper one to make, and the plaintiff ought to have the costs of it as costs in the action. The question whether the lease ought to contain the proviso insisted on by the defendant should be decided now, even though it be referred to chambers to settle the terms of the lease. The question whether such a proviso is usual has been distinctly raised in the pleadings: *Henderson v. Hay*, 3 Bro. C. C. 632; *Blakesley v. Whieldon*, 1 Hare, 176.

NORTH, Q. C., and F. THOMPSON, for the defendant.

The court has no jurisdiction to grant such an injunction. In *Rolleston v. New*, 4 K. & J. 640, it was assumed that there was no such jurisdiction. *Beddow v. Beddow* is not an authority that the principles on which the court acts in granting injunctions have been altered by the Judicature Act.

Day v. Brownrigg, 10 Ch. D. 294, shows that the principles remain the same. *Cooke v. Chilcott* is distinguishable. If the plaintiff would not have been entitled to an injunction to compel us to go on pumping for the whole term of the lease, he can not give the court jurisdiction merely by asking for an injunction for a shorter time. In *Lane v. Newdigate* the injunction was granted on an interlocutory motion. It would be an entire novelty to make such an order at the trial.

[FRY, J.—I do not see my way now to restrain the defendant from discontinuing the pumping until the execution of the lease. The plaintiff consented to the motion standing over to the trial, and thus practically abandoned it. But I am disposed to think that the plaintiff is entitled to the costs of the motion because it was properly made at the time with a view to the interim preservation of the property.]

The object of a mining lease is the mutual profit of the lessor and the lessee. The lessee ought not to be compelled to go on working when no profit can be made. The evidence shows that it is usual in mining leases to insert a clause enabling the lessee to determine the lease under such circumstances, and independently of any custom this would be reasonable: *Gowan v. Christie*, Law Rep. 2 H. L. Sc. 273; *Lord Abinger v. Ashton*, Ibid. 17 Eq. 358; *Wheatley v. Westminster Brymbo Coal Company*, Law Rep. 9 Eq. 538; *Smith v. Morris*, 2 Bro. C. C. 311.

FRY, J.

It is not now in dispute that the plaintiff is entitled to judgment for the specific performance of the agreement, and that will carry with it the general costs of the action. Two questions remain for decision. The first arises upon the motion. Now, what happened with regard to the motion is this: Evidence was filed on the part of the plaintiff on the 22d of May, 1879, and on the 27th, 28th and 29th of May affidavits were filed on the part of the defendant, and those affidavits set up a twofold defense to the entire action:

The first defense was that no *Kilburn* coal existed under the *Oakerthorpe* estate, and the other was, that under the stipulation in the agreement that the usual clauses should be inserted in the lease, it would be necessary to insert a power for the lessee to determine the lease in the event of the mines being found incapable of being worked at a profit; that such had been found to be the case, and that accordingly the defendant was in a position to put an end to the lease. These were serious contentions on the part of the defendant, and they placed the plaintiff in this difficulty: If things were allowed to go on as they were the mine would be drowned out, and if the defendant was successful the plaintiff would find in the result that he had returned upon his hands a drowned-out colliery. On the other hand, if the defendant, who had been pumping down to April, was required by the court to go on pumping until the hearing, he would only be required to do that which he had been doing for some years past, and which could be done at a small expense. The affidavits of the de-

fendant were replied to by the plaintiff on the 7th of June; thereupon followed a cross-examination of the witnesses, and in the result the cross-examination of the principal witness was not completed till the beginning of the present year.

Things taking that turn, it was arranged between counsel that the motion should stand over until the hearing, and that was accordingly directed in November, 1879.

In order to determine whether the plaintiff is entitled to the costs of that motion as part of the costs of the action, it appears to me that I must decide whether, at the time when the notice of motion was given, and looking at the nature of the defenses set up, the motion ought to have been acceded to, and would have been acceded to by the court if it had then come on to be heard. In my judgment it would have been acceded to. As I have already pointed out, the plaintiff was in a position of considerable difficulty. He had no means himself of doing the pumping, because the colliery was in the possession of the defendant. He was, in any event, seriously interested in the continuing of the pumping, because if the defendant should succeed the colliery would become the plaintiff's. Therefore, in the meantime, he was in that position of difficulty. In my judgment, rule 3 of Order LII is addressed to that very kind of difficulty. It provides that "it shall be lawful for the court or a judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property being the subject of such action." That the drowning out of this colliery tended to its destruction can hardly be doubted from the mere statement of the fact, but the evidence upon the point is ample. It shows that the effect of it was singularly injurious to the value of the colliery. And, under all circumstances, having regard to the contract between the parties, and the course of conduct of the defendant—continuing the pumping down to April, 1879—to the nature of the defenses which he set up, the difficulty in which the plaintiff was placed, and the very small injury (if any) which would have resulted to the defendant by his being required to continue the pumping, and the power of the court to provide against his suffering any injury by requiring the plaintiff to make some payment into court, or to under-

take to make some payment in the event of the court ultimately thinking that the order ought not to have been made—considering all these things, I think that the order would have been made upon the motion if it had come on for hearing in the ordinary course shortly after the notice was given.

Therefore, according to my judgment, the costs of the motion must be costs in the cause.

The other question which remains for determination is whether it is usual for leases of collieries to contain a provision to the effect that, when the mines are incapable of being worked to a profit, the lessee should be entitled to determine the lease. The burden of proof, in my judgment, rests on those who assert that such a clause is usual.

[His lordship referred to the evidence on the point.]

I can not, on the evidence, come to the conclusion that such a clause is usual. On the contrary, the weight of evidence seems to me very distinctly with the plaintiff, who denies the defendant's proposition. Two other arguments have been urged. In the first place it appears that such a clause is not uncommon in Scotland and the observations of one of the noble lords in *Gowan v. Christie*, Law Rep. 2 Sc. App. 273, were referred to. But the practice in Scotland and in England is very different in many respects in regard to dealings in landed property and mines, and it is impossible for me to hold the one practice to be a precedent for the other, or an authority binding upon me. The other argument was derived from the observations of the Master of the Rolls in *Lord Abinger v. Ashton*, Law Rep. 17 Eq. 353. But he was there dealing with the proper construction to be put upon a covenant to work mines, and he pointed out that an unreasonable construction had been contended for, which might require the lessee to work at a continuous and regular loss. The difference between that and the present argument is very plain. There the Master of the Rolls was only showing that, during the continuance of the lease, the lessee might not be under any obligation to do more than pay the dead rent; he might be under no additional obligation to work at an actual loss. Here the contention is that the lessee, if he can not work at a profit, has a right to escape from the payment of the dead rent which is reserved during the term.

That argument. as it appears to me, is resorted to simply because no better can be adduced, and it is one which can not possibly succeed in inducing me to hold that such a clause is usual. The two things are plainly very different. Therefore, weighing the whole argument, as well as the evidence before me, I come to the conclusion that the defendant has not supported the contention which he has raised in his defense, and that on the contrary the plaintiff is right in denying that it is usual to insert such a clause.

I shall therefore direct specific performance of the agreement, with the usual reference to chambers to settle the lease in case the parties differ, except that I shall make a declaration that the defendant is not entitled to require a clause to be inserted to the purport or effect that if the mine is not capable of being worked at a profit, the lessee shall be entitled to determine the lease. I direct that the costs of the motion are to be costs in the cause. I ought to add this. When the case was opened I was asked to grant an injunction during the interval between the present time and the execution of the lease. For the reason which I have already pointed out, I can not accede to that view. It was agreed between counsel as long ago as November last, that the motion should stand over. The result was that the plaintiff did not any further urge the pumping until the trial. To require the defendant to begin again the pumping, which has ceased for more than a year, would, in my opinion, be useless and undesirable, and for that reason I do not accede to the application that the injunction should be granted in the interval until the execution of the lease.

THE UNITED NEW JERSEY RAILROAD AND CANAL
COMPANY ET AL. V. THE STANDARD OIL
COMPANY ET AL.

(33 New Jersey Equity, 123. Court of Chancery, 1880.)

Oil pipe line in river, under draw bridge. The defendants, a foreign corporation, without authority, laid a pipe for the transportation of oil, in the channel of the Hackensack river, under the draw of the railroad bridge of the complainants, upon lands belonging to the State. A preliminary injunction to prevent the defendants from interfering with complainants by laying pipe was denied because,

1. The pipe was laid when the bill was filed.
2. It was so laid as not to interfere with the use and maintenance of the bridge.
3. The lands whereon the pipe is laid belong to the State, and it does not complain of any purpresture.
4. The complainants have no monopoly for the transportation of oil and besides, the defendants intend only to transport their own goods.

Bill for relief on bill and answer and affidavits, etc.
Motion for preliminary injunctions.

I. W. SCUDDER, for complainants.

R. GILCHRIST and A. P. WHITEHEAD, of New York, for defendants.

Chancellor RUNYON.

The complainants, the United New Jersey Railroad and Canal Company and the Pennsylvania Railroad Company, ask for a preliminary injunction to restrain the defendants, The Standard Oil Company, a foreign corporation, and certain persons who are acting for that company in the matter, from "interfering, or in any way attempting to interfere with the complainants, by laying any pipe, either on, or over, or under the railroad tracks of the complainants on the draw of their railroad bridge over the Hackensack river, or in any manner, for the purpose of laying such pipes, interfering with

¹ *Central R. R. v. Standard Co.*, 7 M. R. 604, 628.

or occupying the railroad tracks or other property of the complainants, and from laying pipes in the Hackensack river under or over the before mentioned bridge, or through, along, under or over the draw therein, and from laying any pipes on land under tide water in that river, and from flowing oil in the pipes already laid by them."

The grounds of the complaint are that the defendants have, against the protest of the complainants, and by forcible persistence, laid a six inch iron pipe in the channel of the Hackensack river, under the draw of the railroad bridge of the complainants, through which pipe the oil company intends (and such is the purpose for which the pipe is laid) to convey oil from the railroad of the New York, Lake Erie and Western Railroad Company, at or near Snake Hill, in Jersey City, to the works of the oil company at Constables Hook, in the city of Bayonne, and the complainants claim that the pipe, though laid in the channel of the river, which is navigable tide water there, is laid on land which they own, or to which they have some claim of title, and also that the purpose is, in view of their own rights, an unlawful one, viz., to carry oil, which the complainants have a franchise to carry, for tolls; in the exercise of which franchise they insist they ought to be protected.

In the case presented, the complainants do not appear to be entitled to the injunction.

In the first place, the pipe was already laid when the bill was filed, and there is therefore no ground for an injunction to restrain the defendants from laying it. It is laid on the bottom of the river, in the channel, where the water is at least twenty feet deep at low tide. It is capable of being moved twenty feet or more laterally each way, so as not to interfere with the driving of any piles or building any abutments by the complainants which might be requisite or proper for the maintenance of the bridge. It can be raised or lowered, as occasion may require, and will in no wise interfere with any filling where it is laid. Though the complainants make positive claim of title to the land whereon the pipe is laid, the claim is not sustained, but, on the contrary, it appears that the land is the property of the State. The act of 1869, (P. L. of 1869, p. 1026), under which the complainants assert a right to it, authorizes the

United Companies to reclaim and to erect wharves and other improvements in front of any lands then owned by, or in trust for them, or either of them, or which were held by any company in which they had the controlling interest, adjoining the Kil von Kull, or any other tide waters of this State, and to have, hold, possess and enjoy the same, as owners thereof, when so reclaimed and improved, provided such improvement should be subject to the regulations, where applicable, of the riparian commissioners as to the line of solid filling and pier lines; and that they should pay into the treasury of the State, a designated sum of money for the privilege, and should file in the secretary of state's office, on or before a designated day, a map and description of the lands under water in front of the upland before referred to. Neither in terms, nor by implication, did this act give the companies any title or claim to the land under the channel of the river, but the title thereto still remained in the State. The State is not here complaining of any purpresture, and the complainants show no special damage arising to them from the laying or continuance of the pipe in the channel. They have no claim to an injunction on this ground. The defendants do not appear to have been guilty of even a trespass upon the property of the complainants.

But the complainants insist that they are entitled to the injunction on the ground of an unlawful interference with their franchise to transport goods for tolls on their railroads. This claim may be briefly disposed of. In the first place their franchise obviously can not be construed into a monopoly of transportation, so as to exclude all competition, by whatever means, in the transportation of goods for hire; and in the next place, it may be added (though that not material in this case), the object of the oil company appears to be the conveyance, by means of the pipe, of its own goods alone.

The oil company is, as before stated, a foreign corporation. It appears to have acted, in laying the pipe in the river, entirely without authority. Indeed, it does not pretend to have had any. The case presented however does not, as before shown, warrant the granting of a preliminary injunction. It will be denied, but, under the circumstances, without costs.

¹THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
ET AL. V. THE STANDARD OIL COMPANY ET AL.

(33 New Jersey Equity, 372. Court of Chancery, 1881.)

²Practice on appeal—Stay refused pending appeal from order denying injunction. Complainants having applied for a preliminary injunction to prevent defendants from interfering with the removal of an oil pipe line, which crossed the complainants' railroad track, obtained an *ad interim* stay prohibiting the defendants from using the pipe for the conveyance of oil. The injunction being refused the temporary stay was also dissolved. The complainants appealed from the order refusing the injunction, and pending the appeal moved to continue the *ad interim* stay: *Held*, that the question of continuing the order was in the discretion of the court; that it did not appear that any irreparable injury would be done if the stay was not continued; and that the preliminary injunction having been refused, it was also the duty of the chancellor to refuse to continue the stay, which had only been granted as a prudential interference.

Motion to continue *interim* stay, pending determination of appeal.

B. GUMMERE, for the motion.

R. GILCHRIST and A. P. WHITEHEAD, of New York, *contra*.

Chancellor RUNYON.

On the filing of the bill in this cause an order to show cause why an injunction should not be issued pursuant to the prayer of the bill was granted, with an *ad interim* stay prohibiting the defendants, the oil company, from using the pipe for the conveyance of oil. The bill complains that the defendants have, without authority, invaded and usurped the property and franchises of the complainant company by laying pipe for the conveyance of petroleum across the property of the latter, and near and along side of a bridge across the railroad, which the complainants insist was when the pipe was laid, and still is, the property of the railroad company.

¹ S. C., *ante*, p. 634.

² *Lady Bryan Co. v. Lady Bryan Co.*, 7 M. R. 478; *Merced Co. v. Fremont*, 7 M. R. 309; *Swift v. Sheppard*, 1 West C. R. 133; See 7 M. R. 637, note 22.

The pipe was laid in what is claimed by the defendants to be the space taken by condemnation by the municipal authorities of the city of Bayonne, for a public street, in which space the bridge is. The prayer of the bill is, that the defendants may be enjoined from interfering with the complainants in the removal of the pipe from the bridge and from over the railroad tracks, and from interfering with the complainants by laying, or for any purpose using, any pipe either over, on or under the complainants' railroad tracks in Bayonne or elsewhere, or in any manner, for the purpose of laying the pipe, interfering with or occupying the complainants' railroad; and generally for other relief. The defendants answered the bill, and the order to show cause was argued on the pleadings and depositions and exhibits on each side, and the questions in dispute between the litigants were very fully and ably presented and discussed on both sides, and after full and very deliberate consideration the order was discharged. This, of course, dissolved the temporary stay contained in it. From the order denying the preliminary injunction the complainants have appealed, and they now move for a continuance of the *ad interim* stay during the appeal. Whether, on the dissolution of an injunction, the court will continue the prohibition pending an appeal from the order, is in the discretion of the court. The 148th and 149th rules of court provide that an appeal from an interlocutory order or decree shall not stay proceedings without an order of this court, or of the appellate tribunal, to be granted on such terms as the court may see fit to impose. And in case of appeal from a final decree, the appeal, if taken in ten days from the filing of the decree, shall operate as a stay of execution, unless this court or the appellate court shall otherwise order; that is, if the appeal be taken within ten days, no execution shall be issued without order, and if not taken within that time, and execution shall have been issued, the appeal will not stay it unless so ordered. In either case, the application, whether for execution or for a stay, is addressed to the discretion of the court, and will be granted only on good cause shown: *Schenck v. Conover*, 2 Beas. 31.

"If the court," said the chancellor (Green) in the case just cited, "in the exercise of this discretion, see that in case the

decree should be reversed the party can not be set right again, if the complainant proceeds to a sale under his execution, there is a strong reason for a stay of execution. If, on the other hand, the stay of execution is unnecessary to protect the rights of the appellant under the appeal and must operate prejudicially to the complainant, the court ought not to interfere."

In the English practice such applications are not, in general, favored: Eden on Inj., 375; 2 Joyce on Inj., 1319, 1320. In *Monkhouse v. Corporation of Bedford*, 17 Ves. 380, 382, Lord ELDON said that the execution of the decree would not be stayed by chancery on appeal unless the court saw that if it should turn out to be wrong, the party could not be set right again. In *Walford v. Walford*, L. R. 3 Ch. 812, Lord Justice Sir W. PAGE WOOD, speaking on the subject, says the correct course is to stay proceedings pending an appeal only when the proceedings would cause irreparable injury to the appellant, and where inconvenience and annoyance are not enough to take away from a successful party the benefit of his decree. In this State, in *Van Walkenburgh v. Rahway Bank*, 4 Hal. Ch. 725, where the application was to the court of errors and appeals on an appeal from an order dissolving an injunction, for an order in the nature of a temporary injunction retaining the parties and subject-matter of the controversy *in statu quo* until the final hearing of the appeal, the court said that the application was addressed to the sound discretion of the court, and that when an injunction has been dissolved by the chancellor, the appellate court, upon appeal from that order, would usually revive the injunction, either (1) upon a pure injunction bill when the whole matter in controversy is the continuance of the injunction, and where consequently the whole object of the suit would be defeated if the party were not temporarily restrained by the order of the appellate tribunal; or (2) where it clearly appears that the intervention of the power of the appellate tribunal is necessary to prevent great and irreparable mischief to the rights of the appellant.

In the case in hand, no material injury is to be apprehended from the refusal to continue the injunction. The pipe had been laid when the bill was filed. The stop order was merely

against the use of the pipe for the conveyance of oil until the order to show cause could be heard. No injury from leakage in such use of the pipe is reasonably to be apprehended. Nor is any to be anticipated from the presence of the pipe in case the complainants should desire to raise the bridge. The pipe crosses the air space above the railroad at the same height as the bridge, and until the railroad company or the receiver shall wish to raise the bridge, it can not be in their way. If it shall be found to be so when the bridge is to be raised, this court can protect the railroad company's rights, whatever they may be, in the premises. As to the alleged infringement of the complainants' franchise, it does not appear to exist. It is urged, however, that the complainants insist that the oil company has usurped its property, and to permit the latter to continue to do so, is an irreparable injury. But it is a question to be determined whether such usurpation has, in fact, taken place, and seeing that the pipe had been laid when the bill was filed, and there is no danger to be apprehended from the use of it for the conveyance of oil, nor any inconvenience from its presence in case the complainants should determine to raise the bridge, it is clear that no material injury will arise from the refusal to prevent, before the final hearing, the oil company from using the pipe. There is, in fact, no material injury to be fairly apprehended from the refusal to enjoin *in limine*.

It is further urged, however, that such refusal will inflict irreparable injury on the complainants, because it will render relief more difficult, if not impossible, by reason of the fact that under the license which, as the complainants insist, the refusal substantially gives, the oil company may expend money in the enterprise of which the pipe is part, and thus create complications which equity will regard as obstacles to the granting of the rights of the complainants, while such obstacles will be prevented by a continuance of the stay. But as was said in *Easton v. N. Y. & L. B. R. R. Co.*, 9 C. E. Gr. 49, 59, in answer to a like suggestion, the oil company will receive no license or immunity from the refusal of the court to interfere with it on the application for a preliminary injunction. After the bill has been filed, and it has been called into court on the charge of invasion and usurpation of the

railroad company's property, if the oil company proceeds in the same direction, it must be at its peril.

In denying the *interim* interference asked for, the court has not decided that the oil company is in the right in the matters complained of, except so far as the complainants' claim is based on alleged interference with the franchise of carrying goods for tolls. All that this court has determined is, that there is no ground to justify a preliminary injunction, and that it will wait until the final hearing to see whether it ought to issue its prohibitory mandate. I regard the language of Lord BROUGHAM in *Walburn v. Ingilby*, 1 M. & K. 61, 86, as apposite. The application was to stay, pending appeal from it, the execution of an order for production of books and documents.

"It has been said more than once, in this place, that such applications are better made in the House of Lords. And in one of the cases Lord ELDON treated such an application as a misapprehension of the party's proper course, on the ground that the chancellor's order refusing to stay might itself be appealed from, and so on without end. He added, as another reason, that the court of appeal has the power of protecting the party in the possession of the judgment against any vexatious delay consequent on the stay, by advancing the cause where it has been decided fit to grant the application. * *

* I had every inclination, originally, to grant this application; and if, on conferring with others whose experience gave great weight to their opinions, I had found that any doubt was entertained upon the matter of the order or of this motion, I should probably have stayed the execution. But even then I am not sure that I should have done right; for certainly it would be giving encouragement to vexatious appeals upon a large class of the business which occupies these courts. Indeed, were this motion granted upon the allegation that refusing it will enable a party to do something which can not be undone, or to obtain some advantage which can never afterward be wrested from him, it is impossible to conceive any case of an order for paying money out of court, for dissolving an injunction, for appointing a receiver, in which, the same ground existing much more plainly, the same course must not be pursued; and thus the very cases

where it is of the most essential importance that speedy execution should take place, the very cases in which this court possesses its peculiar jurisdiction because of that urgent necessity, will be those in which the argument for suspending execution will be most powerful. In other and better words, in the language of Lord ELTON, the arm of the court will indeed be palsied."

If the order complained of were an order dissolving an injunction, and the bill be regarded as a pure injunction bill, the stay would not be continued unless, in the language of the court in *Van Walkenburgh v. Rahway Bank*, the object of the suit would be unavoidably defeated if the defendant were not immediately restrained, or it clearly appeared that the intervention of the power of injunction was necessary to prevent great and irreparable mischief to the rights of the complainants. I do not see that the object of the suit will be defeated, or irreparable injury be done to the complainants, if the stay be not continued.

But in addition to the foregoing considerations, there is another which is entirely conclusive in this case. The complainants have never been in possession of any judgment of this court in favor of their claim to interlocutory interference. No injunction was granted to them. On the filing of their bill they obtained, not an injunction, but an order to show cause why an injunction should not be issued. The *interim* stay before mentioned, prohibiting the oil company from conveying oil by the pipes, was indeed incorporated in the order; but it was granted only to give the court opportunity, without prejudice to the rights claimed by the complainants by the delay necessary for the inquiry, to inquire, on notice, whether there ought to be any preliminary injunction or not, to enable the court to be careful and circumspect and regardful of the rights of both parties in the use of the injunction power. The fact of the granting of such a stay can give the party obtaining it no claim whatever to a continuance of it in case of refusal to enjoin, and an appeal from the order of refusal; for it is granted only pending preliminary inquiry. It is merely a prudential interference, limited to the time when the court shall have reached a conclusion as to the propriety of granting an interlocutory injunction. It appears to

me too obvious to admit of any dispute or argument; that it is the duty of the chancellor in such a case, where he concludes on such inquiry that there should be no preliminary injunction, to refuse to continue the stay. If the argument of the complainants on this point is well founded, such a stay, though followed by the clearest conviction on the part of the court, after hearing the order to show cause, that an injunction ought not to be granted, must be continued because of the mere fact of the taking of an appeal by the complainants. This would, in effect, be putting into the complainants' hands, to a certain extent at least, the power of continuing the stay. The true ground is, that the question whether the stay shall be continued or not is addressed to the discretion of the court, and the fact that the complainants have appealed from the order discharging it, gives them no right whatever to its continuance, and in no way and to no extent whatever binds the court to continue it.

In the case under consideration there is no ground for continuing the stay. The motion, therefore, will be denied with costs.

VANZANDT, Trustee, v. THE ARGENTINE MINING COMPANY.

(2 McCrary, 642. United States Circuit Court, District of Colorado, 1880.)

¹ Proceedings in contempt are in their nature criminal, and the strict rules of construction applicable to criminal proceedings are to govern therein.

Complainant ousting defendant after order of court enjoining defendant's mining. Where a complainant, out of possession, after obtaining an injunction to restrain the working of a mine by a defendant in possession, thereupon proceeded to oust the defendant, he was compelled, by order, to restore such possession to the defendant, and it was *held further*, that where the object of the writ was to preserve the property pending the litigation, the attempt by complainant to prevent the accomplishment of such object was a gross abuse of the process of the court, and might be considered as grounds for dissolving the writ, but that a violation of

¹ As to notice and proceedings in contempt, see *Golden Gate Co. v. Superior Court*, 2 West C. R. 736; *Brennan v. Gaston*, 7 M. R. 426; *Fremont v. Merced Co.*, 9 Cal. 19. *Post* MANDAMUS.

the spirit of the injunction by a complainant could not be considered as a contempt of court.

Bill in equity, filed by complainant, alleging his ownership of a certain silver mine in this State, and stating other facts upon which a preliminary injunction was granted, restraining the defendant from taking ore from said mine, or from disposing of any such ore pending the suit. Defendant was in possession prior to the allowance of said injunction and there was no order to disturb its possession. After the allowance and service of the writ the complainant took possession of the mine, ejecting the defendant's agent therefrom. Upon application to the court, and proof of this latter fact, an order was issued requiring complainant to restore the possession to defendant, and to abstain from any interference with the same pending further proceedings in the cause. Thereupon defendant moved the court that the complainant be ordered to show cause why he should not be punished for contempt in violating his own injunction.

DIXON & REED, for motion.

THOMAS & CAMPBELL, *contra*.

McCREARY, Circuit Judge.

1. A proceeding for contempt is in the nature of a criminal proceeding, and to be governed by the strict rules of construction which prevail in criminal cases. Its purpose is not to afford a remedy to the party complaining, and who may have been injured by the acts complained of; that remedy must be sought in another way. Its purpose is to vindicate the authority and dignity of the court: *Haight v. Lucia*, 36 Wis. 355.

2. We can not hold that the complainant has subjected himself to this summary criminal proceeding by taking ore from the mine in dispute. Strictly speaking the writ of injunction did not restrain the complainant from so doing; its only effect was to restrain the defendant and to subject its agents to punishment in case of a violation of the order. The injunction did not by its terms, or by its own force, forbid the complainant to interfere with the possession of the mine, pending the suit, and therefore he can not be held to

answer in this proceeding. It does not follow, however, that a complainant, in such a case as the present, can with impunity do the acts, which at his instance the defendant has been restrained from doing. Where, as in this case, the evident purpose of the writ is to preserve the existing status of property in litigation until a final adjudication can be had, it is a gross abuse of the process of the court for the complainant to disregard his own injunction, after having by means thereof tied the hands of his adversary. And no doubt the court has ample power to prevent or redress such abuse. In this case the court did redress it by ordering the complainant to restore the property to defendant and to abstain from any further interference with the possession thereof, pending the suit. If defendant had desired and asked a dissolution of the injunction, the court might have granted it on the ground that complainant was no longer entitled to the exercise of the discretionary power of the court for his protection. See remarks of LYON, J., on the point, in *Haight v. Lucia*, *supra*.

Motion denied.

HALLETT, District Judge, concurs.

1. The first case in which injunction was allowed to stay *trespass*, as distinguished from waste, is cited as *Flamang's Case*, not reported. See *Hanson v. Gardiner*, 7 Vesey, 308; *Mitchell v. Dors*, 7 M. R. 250 and note.

2. Injunction to prevent draining of oil well: *Allison & Evans' App.*, 77 Pa. St. 221; *Post Oil*.

3. Injunctions are granted to prevent trespasses, as well as to stay waste, where the mischief would be irreparable, and to prevent a multiplicity of suits: *Livingston v. Livingston*, 6 Johnson's Ch. 497.

4. Injunction allowed to prevent breaking of ditch: *Derry v. Ross*, 1 M. R. 1.

5. Injunction restraining defendants from working coal mines, to injury of plaintiff, pending determination of their rights at law: *Duke of Beaufort v. Morris*, 6 Hare, Ch. 340.

6. Injunction granted to prevent mine owner from working so as to endanger railway: *North Eastern R. Co. v. Crossland*, 2 Johns. & Hem. 565.

7. Lessees for lives renewable forever, restrained from raising limestone for sale on the demised premises: *Purcell v. Nash*, 2 Jones, 116; 1 Jones, 625.

8. Injunction to prevent former tenant in common from working portion of mine granted by partition to former co-tenants: *Maden v. Veivers*, 5 Beav. 503.

9. Injunction to restrain the collection of notes given for purchase money, as affected by judgment in suit upon the notes: *Emma Co. v. Emma Co.*, 7 Fed. R. 401.

10. Holder of patent for agricultural land restrained from asserting title to lode contained therein: *Gold Hill Q. M. Co. v. Ish*, 5 Oregon, 104; *Post PATENT*.

11. Injunction sought in favor of crops against miners: *Ensminger v. McIntire*, 23 Cal. 593; *Post TRFSPASS*.

12. Injunction sought upon the manner of extending quarry: *Keeller v. Green*, 21 N. J. Eq. 27; *Post QUARRY*.

13. Injunction sought to prevent stoppage of tailings: *Nelson v. O'Neal*, 4 M. R. 275.

14. Injunction to restrain diversion of water not granted when plaintiff is not in condition to make use of it: *Nevada Co. v. Kidd*, 37 Cal. 282.

15. Injunction refused on account of previous application pending in the Federal Court: *New Jersey Zinc Co. v. Franklin Iron Co.*, 29 N. J. Eq. 422. *Vice versa*, *Evans v. Smith*, 3 West C. R. 21; 21 Fed. 1.

16. Injunction to prevent, on the ground of acquiescence, a party injured by copper works from enforcing a judgment recovered by him for damages at law, refused, with costs: *Bankart v. Houghton*, 27 Beav. 425; *Post NUISANCE*.

17. Injunction to restrain tenant for life of coal mines from opening new pits refused: *Clavering v. Clavering*, 2 P. Williams, 389. *Post TENANT FOR LIFE*.

18. Injunction pending suit to enforce specific performance refused: *Geiger v. Green*, 4 Gill (Md.) 472; *Post SPECIFIC PERFORMANCE*.

19. Preliminary injunction refused to restrain a violation of alleged oil rights, the injury not appearing to be irreparable: *French v. Brewer*, 3 Wall., Jr. 346; *Post OIL*. Refused against quarrying, on same grounds: *Hamilton v. Ely*, 4 Gill (Md.), 34.

20. No injunction to restrain a mere trespass where the injury is not irreparable: *Jerome v. Ross*, 7 Johnson's Ch. 315.

21. Injunction to restrain proceeding with a shaft refused, where the facts were doubtful and inspection impossible: *McCurdy v. Noak*, 17 L. J. Ch. 165.

22. No jurisdiction after bill dismissed to enjoin working mine, pending appeal: *Eureka Consolidated M. Co. v. Richmond M. Co.*, 5 Saw. 121; *Post JURISDICTION*. See 7 M. R. 628, note.

23. Injunction refused on account of laches: *Birmingham Co. v. Lloyd*, 18 Ves. 515; *Post LACHES*.

24. Injunction refused to restrain tenants from working mines when owner has stood by for a long time and allowed the working: *Parrott v. Palmer*, 3 Mylne & K. 632.

25. Receiver preferable to injunction: *Deep River Co. v. Fox*, 1 M. R. 296; *Parker v. Parker*, 82 N. C. 165; *Post RECEIVER*; *Falls v. McAfee*, 7 M. R. 639.

26. Injunction not allowed to give affirmative relief: *Menard v. Hood*, 68 Ill. 121.

27. Injunction, prohibitory in form, but necessitating affirmative relief: *Mexborough v. Bower*, 2 M. R. 91.

28. Hardship produced by injunction, to what extent considered upon the application for the writ: *New Boston Co. v. Pottsville Co.*, 5 M. R. 117; *Woodruff v. North Bloomfield Co.*, 1 West C. R. 183.

29. Where insolvency is pressed as the grounds of injunctive relief, it must be satisfactorily proved: *Goodheart v. Raritan M. Co.*, 8 N. J. Eq. 73.

30. Where specific relief (to prevent mining) is prayed for with no prayer for general relief, the complainant can not receive relief other than that specifically prayed for: *Laird v. Boyle*, 2 Wis. 431.

31. Practice on bill and cross-bill for injunctions: *West Va. O. & C. L. Co. v. Vinal*; *Vinal v. West Va. O. & C. L. Co.*, 14 W. Va. 637.

32. Allegation of cutting timber not equivalent to allegation of irreparable damage: *Western M. & M. Co. v. Va. C. Coal Co.*, 10 W. Va. 250.

33. In what case injunction may be allowed without notice: *Thomas Co. v. Allentown Co.*, 28 N. J. Eq. 77; *Post INSPECTION*.

34. Injunction to stay waste in digging mines will not be granted before the coming in of the answer, or default in making answer: *Lowther v. Stamper*, 3 Atkins, 496.

35. The proper use of a quarry is not to be enjoined as waste in favor of mortgagee: *Vervalen v. Older*, 8 N. J. Eq. 98; *Post MORTGAGE*.

36. Account, as incident to injunction: *Ackerman v. Hartley*, 1 M. R. 74.

37. After the right has been established at law where repetition is threatened, it may be enjoined though damage not proved: *Brown v. Ashley*, 16 Nev. 312.

38. Injunction against co-owner of water for excessive appropriation: *Lorenz v. Jacobs*, 2 West C. R. 722.

39. Injunction binds both agents and officers of corporation: *Morton v. Superior Court*, 3 West C. R. 488.

40. Allowed to prevent multiplicity of actions: *Nichols v. Jones*, 19 Fed. 855.

41. Party entitled to absolute. can not be put off with conditional, injunction: *Peo. v. Gold Run Co.*, 4 West C. R. 521.

42. Temporary writ remains under control of court for purposes of modification: *Hobbs v. Amador Co.*, 4 West C. R. 523.

43. The Hydraulic, or Debris, cases: *Hobbs v. Amador Co.*, 4 West C. R. 523; *Peo. v. Gold Run Co.*, Id. 521; *Woodruff v. North Bloomfield Co.*, 1 Id. 183; 18 Fed. 753; 16 Fed. 25.

44. Special appearance not allowed to defendants resisting injunction: *Thornburgh v. Savage Co.*, 7 M. R. 667.

See INJUNCTION BOND.

¹FALLS ET AL. V. McAFEE ET AL.

(2 Iredell's Law, 236. Supreme Court of North Carolina, 1842.)

Want of probable cause. In action upon a bond conditioned to indemnify the defendants in an injunction cause "for all damages they might sustain by the wrongful suing out of an injunction" to stop their working of a certain gold mine, it is necessary for the plaintiffs to show a want of probable cause for the suit brought for injunction; and also, in a legal sense, malice in bringing it.

Malice negatived. Where the party who sued out the injunction really and *bona fide* entertained the belief that he had just grounds for his suit, the idea of malice is negatived, and the action upon the bond can not be supported.

²**To stop the working of a mine by injunction** is against public policy and private justice where a receivership is practicable.

On appeal from the Superior Court of Lincoln County, at Spring Term, 1842; His Honor, Judge PEARSON, presiding.

The plaintiffs brought this action of debt upon a bond of the defendants for \$3,500, with a condition to indemnify the plaintiffs from all damage sustained by the defendants' wrongfully suing out an injunction to stop them from working a gold mine. The plaintiffs read in evidence the bond, also a decree of the Supreme Court dissolving the injunction, and the final decree dismissing the bill with costs. The plaintiffs then proved that in consequence of the injunction they had stopped working their gold mine from February, 1832, to February, 1835, and by reason of thus lying idle, the pit had caved in, the ditch filled up and the washers and other implements been much injured; they also offered evidence to show that if they had not been stopped, they would have made during the three years, with the ten hands then working, \$3,400 per annum, after deducting all expenses, which sums they did not make until 1836-37-38, by reason of being so stopped.

The plaintiffs' counsel then rested the case. The defendants then proposed to offer evidence to show probable cause, and to repel the allegation of malice. But the court inti-

¹ For the original case in which the bond was given, see 6 M. R. 397.

² 7 M. R. 637, note 25.

mated that it was unnecessary, as the plaintiffs had not made out a case; for, in the opinion of the court, to sustain this action it was necessary to show malice and a want of probable cause, the action being similar to an action on the case for wrongfully suing a defendant and holding him to bail, or an action for wrongfully suing out a commission of bankruptcy, or for wrongfully suing out an original attachment, and differed entirely from an action on a prosecution bond, or an appeal bond, in which latter actions a failure to prosecute with effect was sufficient.

The court was also of opinion that the decree dissolving the injunction and the decree dismissing the bill did not amount to *prima facie* evidence of a want of probable cause and of malice. The plaintiffs' counsel then proposed to offer evidence to show a want of probable cause and malice, and it was agreed that the same evidence should be given as had been given in the original case in equity, by which it was agreed these facts were established; that one Carpenter contracted to sell a tract of land to Falls, gave a bond for title, and took notes for the purchase money; that Falls took possession of the land, but was poor and unable to pay for it, and did not for several years pay more than the ordinary rent; that a valuable gold mine was discovered on the land, whereupon the defendants went to Carpenter and induced him to sell the land to them and execute to them a deed; that at the time of their purchase they had notice of the claim of Falls, but believed that, by securing the legal title, they could defeat Falls in a bill for a specific performance, on account of his laches in paying the purchase money, and his inability to pay but for the discovery of the gold mine; that after obtaining the legal title, they sued out the injunction to prevent Falls and Company from working the mine until the equitable title was settled. The court was of opinion that these facts were not sufficient to show a want of probable cause; much less were they sufficient to imply malice. It was then agreed by the counsel to reserve these questions and let the jury pass upon the question of damages. The court left that question to the jury with instructions to find the amount of damages by reason of the dilapidation of the works, and by reason of the plaintiffs not getting the several sums of gold as soon by three

years as they would have got it, but for the injunction, which would be the interest for the time. The jury found for the plaintiffs, subject to the questions reserved, and assessed the damages to \$2,094. Upon the questions reserved, the court was of opinion with the defendants, and directed the verdict to be set aside and a nonsuit entered, from which judgment the plaintiffs appealed.

BADGER, for the plaintiffs.

ALEXANDER and CALDWELL, for the defendants.

RUFFIN, C. J.

The counsel for the plaintiffs has not contended that the superior court erred in its opinion as to the nature of this action, but admitted that it can only be maintained by showing a want of probable cause for the former suit, and also, in a legal sense, malice in bringing it. That admission was properly made in our opinion, as has been already expressed in *Davis v. Gully*, 2 Dev. & B. 360. But it was contended that the court erred in holding that the proceedings and decrees in the former suit did not establish a want of probable cause; and the counsel endeavored to maintain that proposition by minutely commenting on the pleadings and proofs in the chancery suits, and also to infer from the want of probable cause thus established, the existence of malice. We can not, however, recognize any part of those proceedings further than they are incorporated into the record of this cause, since we are restricted to this record as the ground of our decision. Now the parties have agreed here on the inferences of fact, which are to be considered as established by the evidence in the former causes, and among them is one which, in our judgment, puts an end to the plaintiffs' case.

The case, after stating the purchase by Falls and notice of it to the present defendants, proceeds to admit, on the part of the plaintiffs, that at the time they bought from Carpenter and filed their bill, these defendants "believed that by securing the legal title, they could defeat Falls in a bill for specific performance, on account of his laches in paying the purchase money and his inability to pay it, but for the discovery of the

gold mine." Whether that was a reasonable belief or not, is not material to the question we are now to consider.

We remember indeed that counsel gave us much trouble to show that it was not well founded. But supposing that belief to be without a just foundation, we are nevertheless, upon the admission quoted, to take it that it was really and *bona fide* entertained. Thus taking it, the ingredient of malice is absolutely negatived, and the present defendants, instead of having brought a groundless suit for the purpose of oppressing the present plaintiffs and subjecting them to losses, appear only to have honestly sought from the preventive justice of the court a remedy against impending injury to their right or supposed right, until that right could be investigated and established. It has turned out indeed that those parties had not the right they then believed they had, and that the present plaintiffs have sustained a heavy loss from the operation of the process awarded against them.

But much as that is to be regretted, it can not be repaired in the present action as the defendants prosecuted that litigation from sound motives, just as much so as the present plaintiffs are now prosecuting their suit.

The truth is, the party was not so much in fault for asking the injunction, as the judge was in error in granting it. The case arose early after the business of mining began, and the writ was improvidently awarded, without recollecting at the time, that to stop the working of the mine was alike opposed by the public policy and the private justice due to the party that might be found ultimately to be the owner; and that it would the rather promote all interests to appoint a receiver, or take some other method for having the profits fully accounted for. It is, indeed, surprising, that the present plaintiffs had not, at the first opportunity, moved to discharge the injunction by submitting to an order for a receiver. If they had, they would doubtless have avoided most of their losses; and therefore they are to attribute them very much to their own negligence, and must submit to them.

PER CURIAM.

Judgment affirmed.

GEAR ET AL. V. SHAW ET AL.

(1 Pinney, 608. Supreme Court of Wisconsin, 1846.)

Continuance, not the subject of exception. The ruling of the court upon a petition supported by affidavit, for a continuance of a cause, upon the ground that a suit was pending in chancery which would essentially determine the rights of the parties, is a matter within the discretion of the court, and is not the subject of exception or revision upon a writ of error.

Injunction staying proceedings at law. Although the district courts have both equity and common law jurisdiction, yet the practice should be the same as if their different powers were conferred upon separate and distinct courts; and the proper method of procuring the postponement of the trial of an action at law, upon the ground that a suit is pending in chancery which will be decisive of the action at law, is by injunction from the court of chancery to stay proceedings at law.

Pleading. To a count of a declaration upon a bond, *non est factum* is the appropriate plea, but *nil debet* is proper where the bond is set forth merely as inducement.

Want of certainty cured by verdict. Defects for want of certainty in pleading are cured by the statute of jeofails, and where, to a declaration on a bond, the defendants pleaded *nil debet*, and the verdict is that the defendants owe the sum claimed and damages are assessed for its detention, the finding is in effect that the bond sued is the bond of the defendants, and that its condition has been broken, and judgment will not be arrested though the plea was not the proper one.

Execution of bond—Recital. Where G. and N. executed a bond for an injunction in which it is recited that G. had applied for the writ as the agent of H., but the bond was signed and sealed by G., without other reference to H.: *Held*, that the description of himself as agent in the body of the instrument did not exclude his personal liability.

¹ **Action on bond—Nominal damages not to bar proper assessment.** In an action on a bond with a condition, there was a verdict for the penal sum and one cent damages, and judgment was entered awarding execution for the entire sum: *Held*, erroneous, and that execution could not be awarded until the damages had been assessed as provided by statute; that a subsequent assessment of damages and award of execution pursuant to the statute cured the error; and that the assessment of nominal damages by the first jury could not be considered as a determination of the extent of the plaintiffs' claim.

Damages on dissolution of injunction—Sudden increase in product of the mine. An injunction was granted to restrain parties from mining, and, some time after its dissolution, a new discovery was made, and a large quantity of ore raised from it. In assessing damages on the injunction bond, *Held*, proof that the use of the money for which the min-

¹ Compare *Belcher Co. v. Deferrari*, 62 Cal. 160.

eral might have been sold was worth to the parties more than legal interest, by way of enhancing the damages, should be rejected as ideal and speculative; and so, too, as to the proof of the subsequent discovery as tending to show what the parties might have realized had they continued mining, and the injunction had not been granted.

Idem. Damages upon the dissolution of an injunction are to be estimated with reference to the business of the party enjoined, and his profits at the time of the service of the writ, and not upon conjecture founded upon subsequent events not then known or contemplated.

¹ **Counsel fees, etc., as damages.** Counsel fees and expenses of defending the chancery suit are not a proper item of damages, to any greater extent than they were necessarily incident to or caused by the injunction.

Demand need not be proved. In an action upon an injunction bond it is not necessary for the plaintiff to prove a previous demand for his damages.

Oath of jury. In assessing damages on a bond with a condition, after a finding that there has been a breach, it is correct to swear the jury to well and truly inquire of and assess the plaintiffs' damages.

Error to the District Court for Iowa County.

Action of debt on an injunction bond. A motion was made by the plaintiffs in error for a further and amended return, the facts in relation to which are stated in the opinion of the court denying the motion. Evidence was offered and received upon the assessment of damages in the court below, to show that at the time the injunction was served the plaintiffs, against whom it had been granted, had nearly exhausted or dug out all the mineral or lead ore from the discovery that they had then made; that about five or six months after the dissolution of the injunction they made an entirely new discovery of lead ore, at a distance of eighty or one hundred yards from their former discovery, on the same tract upon which they were forbidden by the injunction to work, where a large quantity of mineral was subsequently raised, and for being restrained from raising it during the pendency of the injunction they claimed damages. The testimony was received against the objections of the defendant; all other facts necessary to a correct understanding of the case are stated in the opinion of the court.

MOSES M. STRONG and T. P. BURNETT, for plaintiffs in error.

¹ *Bolling v. Tate*, 65 Ala. 417; 39 Am. Rep. 5, and note.

1. The district court erred in refusing to continue the cause pending the suit in chancery: *Doty v. Strong*, 1 Pinney, 84; *McCarty v. Patton's ex'r*, 3 J. J. Marsh, 263.

2. The jury in the first instance having found the issue for the plaintiffs on the plea of *nil debet*, and assessed nominal damages, and having thus passed on the question of damages, it was not again a proper subject of inquiry. The subsequent inquiry was not conformable to the issue and should not be sustained: *Stearns v. Barrett*, 1 Mason, 173.

3. Counsel fees in the chancery suit were not properly a part of the plaintiffs' damages: 3 Dallas, 306.

4. The evidence as to the discovery of mineral, subsequent to the dissolution of the injunction, was improperly received, and the court erroneously refused to instruct the jury that damages could not be recovered for more than seven per cent. for the use of money: *Peters' C. C.*, 95, 224.

F. J. DUNN, for defendant in error.

MILLER, J.

The plaintiffs in error suggest a diminution of the record in this case, in the following particular: That at the September term, 1843, of the District Court of Iowa county, the plaintiffs in error made a motion to postpone the trial of the cause until the determination of certain suits in chancery; and in support of said motion, filed a petition and affidavit tending to show that the determination of the suits in chancery would have an important bearing upon, and essentially determine the rights of the parties in this case, and that the plaintiffs in error could not safely try this cause until the said chancery suits were decided; which said petition, accompanied with an affidavit, was filed in the district court, and is not sent up with the record. And they now move for a rule upon the clerk of said court to certify the same to this court.

The district court did not postpone the trial of this cause, as prayed for in said petition, which is assigned for error here. This motion for a rule upon the clerk to certify to this court the petition above referred to, is opposed by the counsel for the defendants in error.

When the cause was regularly reached on the docket, the plaintiff was legally entitled to a trial unless legal reasons were interposed to prevent it. This petition was addressed to the discretion of the court. The court was under no legal obligation either to grant or refuse its prayer. It must rest upon the same principle as any other motion for a continuance, or for putting off the trial, which is not a subject for a bill of exceptions or revision here. In the case of *Doty v. Strong*, 1 Pinney, 84, the court remarked that an application for a continuance is generally addressed to the discretion of the court, and is not probably the subject of a writ of error; and that cause was decided exclusively on the question of the privilege of Doty from trial.

From the remarks of the court in the case of *Hurst v. Hurst*, 3 Dallas, 512, there is no doubt but that the application made in the district court to postpone the trial of the cause was addressed to the discretion of the court, which might be granted or refused without being the subject of revision here. In that case a bill for a discovery and account was pending against the plaintiff, which he had refused to answer while he was pressing the trial, and under the circumstances of that case the court entertained the motion.

Although the same judge is clothed with both chancery and common law jurisdiction, yet the practice and proceedings of our courts should be the same as if these jurisdictions were conferred upon separate and distinct courts. This is the only way to prevent confusion and uncertainty in practice. A contrary course is not to be encouraged. An injunction was the proper and legal manner of requiring a postponement of the trial in the district court.

For these reasons it is apparent that if the petition were now attached to the record it could not be taken into consideration by this court. And, therefore, this motion is overruled.

Upon the merits of the case the following opinion was delivered.

MILLER, J.

This suit was brought in the district court for the county

of Iowa, by the defendants in error against the plaintiffs in error, upon a bond. In said bond, Charles Gear, as agent for Thomas Y. How, and Abner Nichols, bound themselves in the penalty of \$2,000, with the condition: "That whereas the said Charles Gear, as agent of Thomas Y. How, has prayed for and obtained an injunction from, etc., enjoining and commanding the said obligees from digging, raising or removing mineral from the southwest quarter of section No. 28, of township No. 1, of range No. 1, east, in the Wisconsin land district; and also from doing or committing any further or other waste in and upon the said premises until the court shall make other order to the contrary; now, if the said Charles Gear, as agent, shall pay or cause to be paid to the said obligees such damages as they may sustain by reason of the issuing of the said injunction, and also all such costs and damages as may be awarded against the said complainant in case the said injunction shall be dissolved," etc. The bond is executed by Charles Gear, under his hand and seal, without referring to How, or using or signing his name thereto.

The declaration is upon the bond as a common bond for the payment of money; and also upon the bond, with a condition, assigning a breach. The defendants filed the plea of *nil debet*.

Upon this state of the pleadings the trial was had and a verdict rendered, "that the defendants owe to the plaintiffs the sum of \$2,000, the penalty of the bond described in the plaintiffs' declaration in manner and form as the said plaintiffs demanded; and that they assess the plaintiffs' damages by reason of the detention of the said debt over and above their costs and charges, by them about their suit expended, at one cent."

The defendants then moved the court in arrest of judgment, which said motion was overruled by the court, and the following judgment entered: "That the said plaintiffs do have and recover of the said defendants as well the sum of \$2,000, their debt aforesaid, as the sum of one cent, their damages by the jurors of the jury aforesaid assessed, together with their costs and charges by them about their said suit in this behalf expended, and that they have execution therefor." Afterward, at the same term of the court, a second jury was called and sworn well and truly to inquire of and assess the plaintiffs' damages,

who assessed the damages to the plaintiffs for and on account of the breach of the condition of the said bond, at the sum of \$748.97. Judgment was rendered for the said damages and costs in the usual form.

Among the errors assigned here, are the following:

"The court erred in overruling the motion in arrest of judgment and also in entering the judgment in the form entered upon the issue, and in the award of execution."

To this declaration there was no appropriate plea, nor was there an issue joined upon the record. It is a well settled rule of pleading, that to a count or declaration upon a bond, *non est factum* is the proper plea, and to a count or declaration in debt, wherein a bond is set forth as the inducement, the plea of *nil debet* is the issue. The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise; and that the jury may not be misled by the introduction of various matters: *Minor and others v. The Mechanics Bank of Alexandria*, 1 Pet. 67. The rule as to certainty in pleadings is formed for the benefit of the parties, and may be waived by them in many cases, both by the common law and by the statute of jeofails. And defects in pleading are usually cured by verdict: *Collum v. Andrews*, 6 Watts, 516; *Cavene v. McMichael*, 8 Serg. & Rawle, 441; *Simonton v. Winter*, 5 Pet. 141; the verdict of the jury was, in effect, a finding that the bond in suit is the bond of the defendants, and that the condition thereof is broken. We therefore do not consider that the district court erred in overruling the motion in arrest of judgment.

In entering the judgment an error occurred, which no doubt was accidental, in awarding execution for the sum of \$2,000, the penalty of the bond. By the statute, no execution could be awarded or issued until the damages were assessed by the court or a jury, for which alone execution is allowed.

The plaintiffs in error assign for error, the refusal of the district court to postpone the trial of the cause.

This court have heretofore decided that the allowance or disallowance of amendments, or the refusal of the district court to postpone the trial or continue the cause, being questions within the discretion of the court, are not such judgments as to be the subject of review upon writ of error.

The error assigned of the refusal of the court to instruct the jury as in case of a nonsuit, has also been disposed of in this court. The district court has no power to instruct or order a compulsory nonsuit when testimony has been given in support of the issue. But if this motion was not intended for a compulsory nonsuit, but for instruction upon the right of the plaintiff to recover upon the evidence, we think the court were right in refusing it, upon the evidence.

The bond was signed and executed by Gear and Nichols, without regard or reference to How, or the alleged agency in the body of the instrument. The bond purports to be made by Gear, and to be sealed by him, and not to be made and sealed by his alleged principal. The description of himself as agent does not, under such circumstances, exclude his personal responsibility: *Lutz v. Linthicum*, 8 Pet. 165; *Hills v. Bannister*, 8 Cow. 31.

By the bill of exceptions it appears that on the assessment of damages, the plaintiffs, in support of their claim of damages, offered to prove that they had paid money to their attorneys in the defense of the chancery suit, and that they had spent time and expended money in the defense of said suit, which said offer was objected to by the defendants, and the objection was overruled by the court, which is assigned for error.

The bond is conditioned for the payment of the damages by reason of the injunction alone, and is not to be enlarged to embrace all and every injury or damage, or expense incurred in and about the suit in chancery. We can only allow, according to the literal condition of the bond. An injunction is a high prerogative writ, executed and enforced in a summary manner. By service of the writ the party is required immediately to withdraw and cease operations; hence the propriety in requiring a bond for the indemnity of the party in such damages as he may sustain by reason thereof. Counsel he must have in his defense of the suit, whether an injunction is issued or not. All a party could claim under any circumstances, would be the fees and expenses incident to the injunction. The injunction in this case was issued upon a bill to stay waste during the pendency of a suit at law, which would entitle the plaintiffs to their costs in and

about the same. The court is of opinion that the attorneys' fees paid are not a legal charge in the assessment of damages: *Arcambel v. Wiseman*, 3 Dallas, 306. In this ruling of the court and the admission of the evidence there was error.

The plaintiffs offered to prove that during the time the injunction was pending, the use of the money for which they claimed they could have sold the mineral, had they not been enjoined from raising it, would have been worth to them more than seven per cent. To this testimony the defendants' counsel objected; the objection was overruled by the court, and the testimony admitted. This is also assigned for error.

It is a general rule that interest is not allowed on unliquidated damages: *Gilpins v. Consequa*, Peters C. C., 86.

Here the testimony offered, was the value of the use of the money for which the plaintiffs claimed they could have sold the mineral if they had not been enjoined from raising it, which we consider merely ideal, and not the subject for computation of interest for the enhancement of damages.

It appeared from the testimony that at the time of the service of the injunction, in September, 1838, the plaintiffs were mining for lead ore on the land described in the bond, and that they had nearly exhausted or dug out all the mineral or lead ore from the discovery that they had then made. That about five or six months after the dissolution of the injunction the plaintiffs made an entirely new discovery of lead ore at the distance of eighty or one hundred yards from their former discovery, although it was on the same ground mentioned in the writ of injunction, and all the mineral was raised on this new discovery; for not being permitted to raise which, the plaintiffs claimed damages. Under the statute, the party is entitled to an execution for so much of the penal sum of the bond as in equity and good conscience is found payable. The assessment of damages is the exercise of the equity powers of the court, in relief of the defendant; and the party is to have so much as he can show himself justly entitled to. In order to entitle the plaintiffs to make proof on which to found a recovery, he should be required to show, at least, an immediate connection between the digging he was engaged at when the injunction was served, and the mineral afterward raised; and that in consequence of the service of the injunc-

tion, he failed in raising it. Although it was on the same land, yet it might not have entered into the contemplation of the parties, before the injunction, to dig where the mineral was found six months after its dissolution. The party is entitled to such damages as he may have reasonably sustained by being deprived of the profits of the work he was engaged at when the injunction was served. If a party make a discovery six months afterward, not connected with engagements or pursuits at the time, or if he make a speculation afterward not contemplated at the time, or if, being a merchant, and enjoined from merchandising or selling a particular stock of goods, he, after the dissolution, enlarges his stock, these additional speculations and profits would not be the measure of damages. The damages are to be estimated with reference to his business and profits at the time of the service of the writ, not upon a supposition arising out of subsequent events not known or contemplated before the writ was served. As presented by the record, we consider that there was error in the admission of this evidence.

The error assigned upon the rejection of the patent to the defendants was withdrawn at the argument.

The error assigned to the decision of the court, that a demand of damages and costs was not necessary, is not well taken. The bond is conditioned for the payment of damages which the party became bound to pay upon the dissolution of the injunction. The payment of damages was the contract of the party which he bound himself to perform unequivocally. No demand was necessary. He became liable to suit immediately upon the dissolution of the injunction. Whatever costs could be legitimately claimed should properly be taxed by a proper officer. Such a practice would save time and trouble at the trial, and enable the party to present his bill for the consideration of the court with greater certainty.

Error is assigned for the manner in which the jury were sworn upon the inquiry of damages, and that the verdict of the jury does not conform to their oath, and for error in the judgment. The jury were sworn well and truly to inquire of and assess the plaintiffs' damages. This form of the oath was correct. The jury on their oaths did say that they found in "equity and good conscience the damages sustained by the

plaintiffs, for and on account of the breach of the condition of the bond declared on by the said plaintiffs, to be the sum of \$748.97, and assessed the said plaintiffs' damages for the breach aforesaid at the said sum of," etc. There is no legal objection to the form used in this record. It is particular and explicit enough, and perfectly intelligible. There is nothing objectionable in the form of the judgment for these damages. All that is required by the statute is that the court award execution for the amount of damages assessed, which is done here.

There was no error in calling a second jury to assess the damages to the plaintiffs. Such damages were not assessed by the first jury. The nominal damages of one cent, from the nature of the finding and of the inquiry at the time, could not have been intended as settling and determining the extent of the plaintiffs' claim. It seems to have been inserted more as a matter of form than of substance. It is merely nominal damages for the detention of the said debt, the penalty of the bond, and not the assessment of the damages the plaintiffs are equitably entitled to upon the condition of the bond.

By the statute, after it is ascertained that the condition of the bond is broken, it is competent for the court to assess the damages, unless either party shall move to have the assessment made by a jury. The parties may, by consent, submit the assessment to the jury sworn to try the issue, and if not, the court or a subsequent jury must make the assessment.

The errors assigned upon different points of the charge are answered, as far as necessary, in the foregoing investigation of the points arising upon the evidence.

It is considered and adjudged by the court, that the judgment of the District Court for Iowa county be and it is reversed with costs.

Reversed.

MORGAN V. NEGLEY.

(53 Pennsylvania State, 153. Supreme Court, 1866.)

Measure of damages where building tramway had been enjoined.

Morgan sold to Negley certain coal in place, with privilege to shift the incline and railroad from the pits. Negley commenced the road, but at Morgan's suit was restrained by injunction, which was afterward dissolved. Negley, without constructing the road, sold to another, and brought suit on the injunction bond. *Held*, that the difference between the cost of constructing the road when the injunction was laid and when it was dissolved, was speculative and consequential, and should not have been submitted to the jury.

Idem. Had the property continued in the hands of Negley, and he had finished the road at increased cost, it would have been a proper item of damages.

Error to the Court of Common Pleas of Allegheny County.

This was an action of debt to March term, 1863, by Felix C. Negley against James B. Morgan, on an injunction bond, in the penal sum of \$2,500.

Morgan sold to Negley "certain coal, with incline and railroad." The agreement of sale authorized the shifting of "the incline and railroad," in pursuance of which Negley commenced to build a railroad upon the surface of Morgan's land. Morgan, denying that the agreement gave the right so to build, filed a bill to restrain Negley, and the court awarded a preliminary injunction, upon Morgan entering into bond in the penal sum of \$2,500. The injunction was served January 11, 1861. On final hearing the court dismissed the bill, and the decree was affirmed in the Supreme Court, January 5, 1863.

After the dissolution of the injunction Negley took no steps toward building the road, and in March, 1863, sold his purchase to Dickson & Co., who constructed a road on a new plan, with a different route and grade. Negley having brought suit on his injunction bond, on the trial, before STREBETT, P. J., the plaintiff, under objection, was permitted to prove the difference between the cost of building the railroad when the injunction was laid and when it was dissolved. The

defendant submitted this point: "As it appears from the evidence that the plaintiff never constructed his proposed railroad, and that no road upon the plaintiff's plan has been built, the jury, in their assessment of plaintiff's damages, are not to include the supposed difference, to wit, \$500, between the cost of such road in the winter of 1861 and the cost of such road after the injunction was raised."

On this point the court charged: "As to the second point, you have the testimony of John Dickson, who testifies in substance that * * it would cost \$500 more to construct the road immediately after the injunction was dissolved than it would have done to construct it when the plaintiff was stopped by the injunction. And, in order that we may distinguish between the items of damage hereafter, if deemed necessary, we request you to add to your general verdict the amount which you may find under this second head, viz., the difference between the cost of constructing the road after the injunction was dissolved, say in October, 1862, and the cost when the plaintiff was stopped, in January, 1861."

The verdict was for the plaintiff for "\$2,347.16, which sum includes \$500 which we find as the difference between the cost of constructing the road immediately after the injunction was dissolved and the cost of constructing when the plaintiff was enjoined." Judgment was entered on the verdict for \$2,347.16, and Morgan took a writ of error, assigning for error the admission of the evidence and the part of the charge above given, besides other assignments of error which were not considered by the Supreme Court.

HAMILTON & ACHISON, for plaintiff in error.

MARSHALL & BROWN and A. M. WATSON, for defendant in error, cited *Hoy v. Grenoble*, 10 Casey, 9.

The opinion of the court was delivered November 2, 1865, by THOMPSON, J.

The learned judge in the court below properly referred the jury to the condition of the injunction laid, for a breach of which the suit being tried was brought, and charged that it

bound the defendant to pay all such damages as might have been sustained by the plaintiff, by reason of the injunction granted. That was a correct chart to go by. But in the practical operation of ascertaining what these damages actually were, we think there was error in one particular. We agree that the difference between what it cost to take out and run over the old road, coal mined, after the new road might have been completed, had it not been for the injunction and the time when it ceased to operate, was a proper standard of damages, and so might any other injury to the plaintiff, the direct consequence of the injunction, have been included. There is no dispute about this. But we think the specific item of damages of \$500 predicated of the testimony of John Dickson, of the firm of Dickson, Stuart & Co., permitted to be considered by the jury, was an error, both in the admission of the testimony and in the charge upon it. These damages were not direct, but speculative and consequential, and, as such, were not covered by the bond, and not in contemplation of the parties stipulating. What were the damages? To answer this, we refer to the facts. It appears that the plaintiff did not incur any additional expense in constructing the new road by reason of the increase of prices, for he did no work at all after the injunction fell. He sold the entire property and works, and the purchasers finished the road begun, but only partly constructed, according to the plan of the plaintiff, at their own expense. Now it was not shown that they would have given in their purchase the difference between what it would have cost when they bought, and what it could have been done for at, or shortly after the injunction laid, nor that they would have given any more for the property, the road being finished as the plaintiff proposed doing, than what they did give. There is no better ground for the claim on this footing, in view of the testimony, than a *peradventure* that they might have done so. If the property had remained in the hands of the plaintiff, and he had finished the road at an increased cost, owing to the general advance in the expense of materials and labor, it undoubtedly would have been a matter for which he might properly have claimed damages. It would then have been clearly within the condition of the bond. But that would be a different thing from this claim. This is a claim,

not for what the plaintiff's property had been depreciated or injured, but for what it is supposed he might have gotten for it if he had finished the road, to wit, the increased cost of construction, when he sold, over what the actual cost would have been if he had not been stopped; in other words, the profit on the work. But it was not shown, as already said, that this circumstance lessened the selling price of his land, or would have increased it; and, as such damage was not the necessary result of the facts, it could not be inferred. We think, therefore, on these grounds the court erred in allowing it. But we do not deem it necessary to send this case back for re-trial; the finding of the jury being special as to the item of \$500 and judgment afterward entered including it, we will reverse the judgment, with direction to the court below to enter judgment less this amount.

Judgment reversed, and judgment to be entered below in accordance with the foregoing.

CAMPBELL ET AL. V. METCALF ET AL.

(1 Montana, 378. Supreme Court, 1871.)

Measure of damages. In a suit upon an injunction bond in aid of a writ restraining defendants, who were three miners and were prevented from working their placer claim for sixty days, the value of their labor, proved to be \$18 per day for the three men, allowed as proper damages.

Idem—Counsel fees. In suit upon an injunction bond given in support of a writ to prevent the working of mining ground, fees paid to counsel for services rendered in the trial of title are not recoverable. The recovery is restricted to the services of counsel in procuring the dissolution of the injunction.

Appeal from the District Court of Meagher County, Third District.

This action was tried in November, 1870, before SYMES, J. and the jury returned a verdict for Campbell and other plaintiffs. Metcalf made a motion for a new trial, which was overruled in May, 1871, by WADE, J. The facts appear in the opinion.

CHUMASERO & CHADWICK, for appellants.

SHOBER & LOWRY and W. E. CULLEN, for respondents, who were plaintiffs below.

KNOWLES, J.

This is an action on an injunction bond for damages occasioned by the wrongful suing out of an injunction. It appears from the record that one David P. Rankin had brought an action to recover the possession of a certain mining claim against respondents. That as the said mining claim was valuable only for the precious metals therein contained, and in order to prevent any judgment he might obtain from being valueless, he had procured a temporary injunction pending the action restraining respondents from working said claim. The action was decided in favor of respondents. They allege that by reason of this injunction they were compelled to remain idle for a certain time, that they were damaged by reason of the filling up of their drain and shaft during the time they were restrained from working the same, and that they were compelled to pay \$1,000 attorney fees to procure the dissolution of said injunction, and that they were otherwise put to expense and trouble. For all of these causes they allege their damages to be \$5,000.

It appears from the testimony presented in the record that respondents were idle about sixty days and that the value of the work of all three was \$18 per day. This would amount to \$1,080. It does not appear what amount of damages respondents sustained by reason of filling up their drain and shaft. It appears that \$1,000 was paid by respondents for attorneys' fees in the action which involved the title to the mining claim, but it does not appear what portion of this \$1,000 was paid for procuring the dissolution of the injunction. It appears they spent \$100 in going to Helena to procure counsel in this action about the title to the mining claim, but what proportion, if any, was spent in procuring counsel to dissolve the injunction is not shown. The jury returned a verdict for \$1,250 damages, and judgment was entered against appellant for this amount.

The attorney fees and expenses in the action between respondents and Rankin in determining the title to mining ground were not properly chargeable as damages for the dissolution of the injunction. If any portion of these attorney fees and expenses were paid for that purpose, it devolved upon the respondents to show what portion. As they failed to do this the jury were not warranted in finding any damages on account of them. The verdict of the jury is clearly erroneous, then, to the extent of \$170.

It does not appear to us that the jury were at all to blame for this verdict, but the court. The instructions of the court are such that without much doubt the jury were misled upon this matter. The following are among the instructions given by the court:

The latter portion of the first instruction reads thus: "In estimating such damages you are to take into consideration a reasonable attorneys' fee in procuring the dissolution of said injunction."

The fifth: "Reasonable counsel fees and other expenses necessarily incurred in the defense of the injunction suit, are recoverable as damages in an action on the injunction bond."

Second instruction asked by appellants:

"That the only attorneys' fees that can, in a case of this kind, be recovered as damages, are those which are confined to the motion to dissolve the injunction and can not include those for the trial of the question of title to the property on the merits of the action."

This portion of the instruction was given and the following refused:

"And unless the jury can separate the two branches from the evidence they will not be justified in rendering any verdict for damages on account of attorneys' fees."

Third instruction asked by appellants and refused by the court:

"If the contract relative to attorneys' fees was to pay a sum certain for the whole case, including the trial of the merits, the motion to dissolve the injunction, and in all courts to which the case might be appealed, the jury can not separate the different species of service to be rendered and assess damages upon a portion of the same."

Fifth instruction asked by appellants and given:

"The jury in estimating damages, if they think from the evidence that any have been sustained by plaintiffs on account of attorneys' fees, can only take into consideration such as were necessarily incurred in procuring the dissolution of the injunction and do not include attorneys' fees for the trial of the merits of the action or any subsequent proceedings, nor can the plaintiffs recover for any more attorneys than were actually necessary to procure the dissolution of the injunction."

Taking these instructions together and considering the fact that there does not appear in the record one scintilla of evidence that shows or seeks to show what proportion of the \$1,000 attorneys' fees or of the \$100 expenses were properly charges as damages for the dissolution of the injunction, and the inevitable conclusion is forced upon us that the court left to the jury, as though they were a committee of experts, the novel task of determining, without evidence or guides but their own experience and judgments, what portion of this \$1,000 attorney fees and \$100 expenses should be apportioned as legitimate damages in procuring the dissolution of this injunction. This was a duty that might well perplex and confound the most astute expert in such matters. Surely it was not the proper province of any jury to determine such a matter. As there was no evidence to show how much money had been paid to procure the dissolution of this injunction it was improper for the court to give any instructions which would lead the jury to consider the matter. It was certainly error in the court to refuse, as it did in the latter portion of instruction second and in instruction third asked by appellants, to instruct the jury, that if the evidence did not show what proportion of these attorney fees and expenses were properly chargeable as damages for the procuring of the dissolution of the injunction, they could not find any damages for this cause.

It does not appear but that the \$1,080 were proper damages in this case.

The judgment of this court is, therefore, that the order overruling a motion for a new trial be reversed and the judgment of the court below set aside, unless respondents shall

remit \$170 of their judgment and pay the costs of this action since the rendition of the verdict by the jury.

Judgment affirmed in part and reversed in part.

STREETER ET AL. impl. with PAUL, v. THE MARSHALL
SILVER MINING CO. ET AL.

(4 Colorado, 535. Supreme Court, 1879.)

Practice—Defendants for whom no appearance is entered. Where counsel in the first of a series of pleas filed, expressly designate the defendant for whom they appear, the words, "the defendants" in the subsequent pleas must be referred to the defendants named in the first plea and can not fairly be held to be an appearance for a defendant served, but not named in the first plea. There being no appearance for such defendant it is error to enter final judgment against all the defendants, without first entering judgment by default against the one for whom there is no appearance.

An entire judgment, if reversed as to one defendant, must be reversed as to all.

Measure of damages—Expenses in protecting the mine. Money alleged to have been paid in the employment of men to hold a mine, so as to prevent it from being "jumped" during the existence of an injunction against working it, is not a legitimate item of the damages covered by the injunction bond sued upon.

Idem—It is a fundamental rule that no damages can be allowed which are not the actual, natural and proximate result of the wrong committed.

Appeal from District Court of Clear Creek County.

Debt upon an injunction bond, wherein the Marshall Silver Mining Company and others, the appellees, were plaintiffs, and Eli F. Streeter, Walter N. Webster, impleaded with Philip Paul, were defendants. The declaration is in debt, in the usual form, on an injunction bond, in a case in which Walter N. Webster and Joseph Rist were complainants and the above named appellees were defendants, in which injunction was granted to restrain the said appellees from working certain property on the Seneca and Cayuga lodes in the county of Clear Creek.

The breach assigned was, that the said suit was dismissed and the injunction was dissolved as having been wrongfully issued; that by reason of the issuance of said injunction the

STREETER V. MARSHALL SILVER MINING Co. 661

appellees herein had suffered loss of profits in working the property, and had been obliged to keep in their employ a large number of men, etc., and that the complainants in said injunction suit had failed to pay either the costs of the suit or the damages suffered by the appellees herein.

The pleadings, after the title, etc., begin: "And the said defendants, Walter N. Webster and Eli F. Streeter by H. M. and W. Teller, their attorneys, come and defend the wrong and injury, when," etc. The subsequent pleas began as stated in the opinion. The defendants were all served.

The evidence, as appears by the record, was substantially as follows:

Solomon Robinson was sworn as a witness, on behalf of the plaintiff, and testified: "I know Compass and Square lode; was mining on the north wall of this lode in the fall of 1871; had been mining five or six months; we had a lease from the Marshall Silver Mining Company; we had possession of 250 feet southwest of the tunnel; we were working twelve men; the lease run until the 1st of May, 1872; we were working these men when the injunction was served; we had a good body of ore; the ore was yielding from 600 to 900 ounces per ton, worth \$1.10 per oz.; the crevice was from 1 to 6 inches in width; the second class ore run from 150 to 300 ounces per ton, and was worth 85 cents per oz.; pay streak was from 8 inches to a foot wide; two thirds of the ore was second class; we only made two classes of ore; we took out, perhaps, a half a ton per day of both classes of ore, 333 pounds of the first class and 666 pounds of the second class; we paid \$3.50 per day to the men; it cost us \$42 per day to run the mine besides powder, candles, etc.; the difference between the amount received and the expenses would be the profits; we paid the company on the lease one third of the amount taken out; we were stopped forty-five days by the injunction. We had four men employed during that time in running a drift; this drift was run to satisfy the court; can't say we took out pay in the drift; the twelve men all stopped work except the men in the drift; I had orders from the Marshall Silver Mining Company to keep the men; I don't know as I can tell the reason why the men were kept; Marshall or-

dered me to keep the men I had, and have it understood that they were on pay; it was necessary to keep the men because the mine was liable to be jumped; the injunction was dissolved about the 20th of January, 1872; we had not the opportunity under the lease to get all the ore we could have taken out if injunction had not been served.

On cross-examination witness testified: "We worked on the lease until the first of May; I think the working would average as I have stated; the cost of steel, powder, etc., would not be a great deal; the lease was to John Wycoff, Charles Sargent and myself; we sold the ore to the mill; something over one half run 900 ozs.; I think the average of the first class would be \$750 per ton; I think the average of the second class would be \$250 per ton; had been working on the ore vein when stopped, about a month; had been working under the lease from about the 1st of October; F. J. Marshall was agent of the Marshall Silver Mining Company; he told me to keep the men, and I kept the most of them; I kept eight of them; four of them were in the drift the most of the time, the others were not doing anything the most of the time; the drift was run on the Compass and Square lode; I hardly thought it was necessary to keep four men to keep the mine from being jumped; over one half the men have been paid; I paid three of them; I paid them \$90 each for wages that had accrued after the injunction was served; I worked in striking and blacksmithing for the four men; we had no other business; no person volunteered to employ us; I did not try to get work elsewhere; don't know whether Wycoff and Sargent were at work or not; I suppose they could have got work if they had wanted it."

The plaintiff then called F. J. Marshall, who testified: "I am president of the Marshall Silver Mining Company, and was so in 1872; I gave directions when I was notified of the injunction to keep the men, but to stop work; I received notice from my attorneys that injunction would be dissolved, and that was one reason why I kept the men; another reason was, I heard some hints that somebody would try to take possession by force. I know of expenses of Mr. Johnson, the surveyor, incurred in that case." The witness was here asked to state if it was necessary in the case to have survey and plat

of the premises, and whether such survey and plat were made, to which the defendants by their counsel objected, as being immaterial, but the objection was overruled, and the defendants excepted. The witness answered: "I regarded it necessary, and the survey and plat was made." The witness was then asked: "What did you pay Mr. Johnson for that survey?" To which question the defendant objected as being incompetent, and that what they paid would be no measure of damages in this action upon the bond, and if paid it was an expense not covered by the bond; but the court overruling the objection, the defendants excepted. The witness thereupon answered: "To the best of my recollection \$90; and his services were worth what we paid. I had some other expenses in going back and forth to Central, and in looking up the witnesses." The witness was here asked to state, if he could, how much money he had expended in procuring witnesses in support of his motion to dissolve the injunction, to which the defendants objected; but the court overruling the objection, the defendants excepted, and the witness answered: "I am satisfied it was not less than \$100; this \$100 was spent in employing a man to look up the witnesses."

The plaintiffs thereupon rested their case.

The defendants thereupon called the witness, Robinson, who testified: "We worked under the lease till May 1st, when it expired." The witness was then asked: "Did you or did you and your co-lessees, after the 1st of May, 1872, take a new lease of this same property on the Square and Compass lode?" To which the plaintiffs objected, and the court sustaining said objection, the defendants excepted. The defendants then offered to show by this witness that he, the witness, took a new lease from the 1st of May, 1872, upon the same terms as the former lease and of the same ground, and worked the same till the ore was worked out. To the reception of which the plaintiffs objected, and the court sustaining the objection, the evidence was not received and the defendants excepted. Witness then proceeded: "I did not work out all the ground that would pay to work by the 1st of May, 1872; we had worked out, on the 1st day of May, about one half the ground we found would pay to work;

we had a pocket of ore 50 or 60 feet long; I judge we took out in the neighborhood of 100 tons of ore."

Defendants then introduced as a witness Walter N. Webster, who testified: "I know Charles Sargent; I had a conversation with him one week ago to-day about the amount of ore Robinson, Wycoff and Sargent were taking out of the Compass and Square lode when they were enjoined."

The witness was asked: "What was said about it by Mr. Sargent?" To which question the plaintiffs objected, "that it was since assignment to plaintiff and was incompetent," and the court sustained the objection, and the defendants excepted.

The jury returned a verdict in favor of the plaintiffs, a motion for a new trial was interposed and overruled, and judgment entered on the verdict in the sum of \$5,000 debt and \$1,440 damages.

H. M. & W. TELLER, for appellants.

HUGH BUTLER, for appellees.

ELBERT, J.

There was no appearance in the court below by the defendant Paul.

Where counsel, in the first of a series of pleas filed, expressly designate the defendants for whom they appear, the use of the words "the said defendants" or "the defendants" in the subsequent pleas, designate the defendants named in the first plea and can not fairly be held to be an appearance for a defendant served but not named in the first plea: *Gargan et al. v. School District No. 15*, 4 Col. 53, and cases there cited. There being no appearance by the defendant Paul, it was error to enter final judgment against all the defendants, without first entering judgment of default against him: *Good v. Martin*, 1 Col. 406. An entire judgment against several defendants must be reversed as to all. It can not be reversed as to one and affirmed as to the others: *Gargan et al. v. School District No. 15, supra*. In view of another trial it is perhaps well to notice some of the questions raised by the instructions and argued by counsel.

The defendant asked and the court refused to give the fol-

lowing instruction: "That the money alleged to have been paid for the expenses of men to watch or hold the mine against other than the defendants in this case, can not be allowed in this case, and it is not a legitimate item of the damages covered by the bond sued on."

The refusal to give this was error, and in contravention of the fundamental rule that no damages will be allowed which are not the actual, natural and proximate result of the wrong committed.

Another instruction asked and refused is as follows:

"That if they believe, from the evidence, that the Marshall Silver Mining Company, one of the plaintiffs, was the owner of Compass and Square lode; and that at time of service of writ of injunction referred to in bond upon which suit was brought, it had leased the same to Robinson, Wycoff & Sargent, and by the terms of such lease were to have one third the proceeds of the ore taken out of the property so leased, then defendants in this case are not liable to the company or to any or all of these plaintiffs for the amount of such one third, even although the said lessees were prohibited by the injunction from working said property, unless it has been shown that said company, in consequence of the issuance of said writ of injunction, lost said one third or some portion of it, or was unable to lease said property on the same terms; and that if the ore remained in the mine, in the absence of proof that the company could not lease the said mine, and procure the ore to be taken out on the same terms as in the former lease, the said company can not be held to have suffered any damage, by reason of the failure of lessees to take out such ore, and the jury should allow no damages to the said company on account of said injunction."

This instruction is not free from objection.

The premises do not warrant the broad conclusion that "the jury should allow no damages to the company on account of the injunction;" nor is the right to recover the value of the one third of the proceeds at all dependent on the ability or inability of the company to lease its mine on the same terms. But in so far as it excludes the value of the one third of the product of the mine going to the company under the terms of the lease, from the damages recoverable by the plaintiffs, it is

correct. The company did not, by reason of the injunction, lose its ores, but their production for forty-five days under the terms of the lease. There was no loss of property; there may have been a loss of profits. If, for instance, the company was compelled to pay higher rates than under the terms of the lease for mining the same ores, there was a loss of profits in this respect to the extent of the increased cost, which was the legitimate subject of recovery. So, too, a loss of profits, arising from loss of the use of the product or its value, would afford ground of compensation."

Another instruction refused by the court is as follows:

"That plaintiffs in this case can not recover of defendants herein any damages on account of any loss of profits alleged to have accrued to Robinson, Sargent & Wycoff, or either of them, growing out of the said lease testified to by Robinson, unless said plaintiffs have shown by the evidence that said parties were, by the delay and stoppage of the work under said lease, occasioned by the issuance of the writ of injunction, actually deprived of such profits, and that they were unable to procure a new lease upon the same terms as the first one, upon which to work the ground so leased by them."

This instruction was properly refused. Robinson, Sargent & Wycoff were lessees, and were entitled to recover the value of the lost period of their lease without reference to their ability to make a new lease on the same terms.

It is not intended here to lay down a rule covering all the damages recoverable on the bond, but simply the rule upon the points indicated.

The right of the obligees in this bond to maintain a joint action thereon is not called in question, and we are not to be regarded as deciding the question by implication. The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

Reversed.

1. Attorneys' fees in the suit to determine the title, not allowed in the suit on the injunction bond: *Allport v. Kelley*, 2 Mont. 343, following *Campbell v. Metcalf*, ante, 656; *Sean v. Timmons*, 81 Ind. 243.

2. All proximate damages recoverable: *Terrell v. Ingersoll*, 10 Lea (Tenn.), 77.

3. Sureties and principal may be jointly sued: *Ducket v. Price*, 7 Colo. 84.

THORNBURGH V. THE SAVAGE MINING CO.

(1 Pacific Law Magazine, 267. U. S. Circuit Court, District of Nevada, 1867.)

¹ **View of mine with use of means of access.** Where the question at issue was the identity of the lode claimed by plaintiff with the lode claimed by the defendant, which could only be determined by inspection of underground developments of the mine in possession of the defendants: *Held*, that it was a proper case for an order of inspection, and the order was made, allowing view and survey of the mine by the complainant, with his attendants and witnesses not to exceed nine in number, during five successive days, the defendant being commanded to furnish all means of ingress and egress and means of traversing the mine.

² **Jurisdiction of U. S. Courts over foreign corporation.** A corporation, organized in the State of California, but owning and working mines in Nevada, having agents who are served with process in Nevada, is a person found in the district within the meaning of the Judiciary Act of 1789.

Idem—Service in such cases. A corporation organized in California, but owning and operating mines in Nevada, is subject to all the liabilities growing out of its mining business or its ownership of mining property, and can be reached by process of the circuit court, by service upon its resident managers, under section 29 of the Practice Act of Nevada, adopted by the rules of the United States Circuit Court; and such corporation is a body politic within the State of Nevada.

Injunction—Special appearance. A court of chancery, where the sole object of a bill filed is to obtain an injunction, will not allow that object to be resisted without holding the defendant to a general appearance in the action.

Before granting an order for the inspection of a mine, the court must be satisfied that the application is made in good faith, and in granting it will pay due regard to the convenience of the party affected. But a court of equity has the power to make and enforce an order of this kind, and where the facts to be determined can not be discovered except by inspection of a mine in the possession of the defendant, and accessible only by a deep shaft and machinery, it would be a denial of justice to refuse it.

By the Court, BALDWIN, J.

On the 12th day of February, instant, an injunction was granted against the defendant in this action, restraining it from mining upon certain premises in the complainant's bill described.

The injunction issued upon the return day of a rule to show

¹ *Stockbridge Co. v. Cone Iron Works*, 6 M. R. 317.

² *U. S. v. Parrott*, 7 M. R. 335.

cause, which rule the court found to have been properly served upon the defendant.

While the injunction was not immediately contested prior to the granting thereof by the court, questions had arisen in the action and adjudications had been made, of which, as well as of the facts which had transpired, it is thought best to preserve a record. On the 23d of January, 1867, the complainant filed his bill in this court. The defendant is a corporation organized under the laws of California, but holding property and carrying on its business of mining in this State. A subpoena was issued upon the bill and by the marshal served upon Charles Bonner, the superintendent and general managing agent of the defendant. The subject-matter of the litigation thus commenced was a quartz vein called the "Mitchell lode," alleged to exist immediately east of another vein admitted to belong to the defendant and styled the "Comstock lode."

The day after it was filed the complainant's solicitors, upon the bill and an affidavit, moved, before one of the judges of this court at chambers, for an order of survey and inspection of the premises in dispute, and of such mining works adjacent as might serve to enlighten the issue of fact in the action. At the same time a rule to show cause why an injunction should not issue was applied for, and, as is usual, was granted.

The judge had in a previous case determined the propriety of granting an order of survey such as the complainant sought for here, but in deference to the convenience of the defendant declined to act *ex parte*, and issued a rule to show cause, returnable the following day.

The complainant's affidavit, upon which, together with his bill, the application for survey was based, and the judge's order thereon, it is thought worth while to copy in this opinion.

VERIFIED PETITION FOR INSPECTION.

United States of America: In the Circuit Court of the United States for the District of Nevada: In Equity..

William B. Thornburgh, complainant, v. The Savage Mining Company, defendant. District of Nevada, ss. Wm. B. Thornburgh, being duly sworn, deposes and says: That he is

the complainant in the above entitled suit; that the same has been brought and is pending in the above entitled court for the purpose of enjoining and preventing the defendant from further working or taking out ore, or other mineral substance from or upon the premises and property of deponent, which are described as follows, to wit:

That portion of a certain quartz lode commonly called and known as the Mitchell lode, and lying adjacent to and next east of the quartz lode commonly called and known as the Comstock lode, bounded on the north by the southern boundary line of the mining claim located and known as the Breckenridge Company's claims, and on the south by a line drawn at right angles with the course of the quartz lode worked by the Hale & Norcross Company across said Mitchell lode, and through the said Hale & Norcross Company's north line, and being the northern portion of the mining claim located by I. E. Brokaw and others, on the twenty-first day of January, A. D. 1861, as commencing at a certain stake at Burk's blacksmith shop, near C street, in Virginia City, and running thence southerly along and on said Mitchell lode. Together with the dips, spurs, angles and variations thereof, and surface room for the convenient working of the same as a mine, and the appurtenances, said premises and property being situate in the Virginia Mining District, in Storey county, Nevada; which suit is in aid of an action at law, brought and pending on the law side of said court, by the deponent against the defendant above named, to recover possession of said property and premises from them; that the said defendants are in the exclusive possession of the said premises and property, and of all works, drifts and developments by which the questions in controversy between the parties to said suit and action can be determined, and from an inspection of which only can the merits of the controversy be seen and understood.

That the main question involved in the suit is, whether the premises and property described is a separate and distinct quartz lode, different and independent of and from the quartz lode known as the Comstock lode; the complainant, this deponent, contending and believing that the affirmative answer is true, and the defendant contending that the negative is the true answer.

And this deponent further says that the premises, property and quartz lode above described, is a separate, distinct and independent lode, of and from the quartz lode known as the Comstock lode, and that the truth will be shown so to be by an inspection and survey of the works and drifts and developments existing in, upon and over the said two lodes, and the intervening space, and such inspection and survey are necessary in the premises.

W. B. THORNBURGH.

Sworn and subscribed to before me, this January 24, 1867.

ALEX. W. BALDWIN, U. S. Judge.

RULE TO SHOW CAUSE, RECITING ORDER FOR INSPECTION, AS
PRAYED FOR.

Wm. B. Thornburgh, complainant, v. The Savage Mining Company, defendant. District of Nevada, ss. On reading the affidavit of Wm. B. Thornburgh, complainant in the above entitled suit, and good cause appearing therefor, on motion of Mesick and Seely, solicitors for complainant,

It is ordered that an inspection and survey be made by the complainant and his employes and attendants, not exceeding nine in number, of the following described premises, property, works, drifts and developments, to wit: All that portion of a certain quartz lode commonly called and known as the Mitchell lode, and lying adjacent to and next east of the quartz lode commonly called and known as the Comstock lode, bounded on the north by the southern boundary line of the mining claim located and known as the Breckenridge Company's claims, and on the south by a line drawn at right angles with the course of the quartz lode worked by the Hale & Norcross Company across said Mitchell lode and through the said Hale & Norcross Company's north line, and being the northern portion of the mining claims located by I. E. Brokaw and others, on the twenty-first day of January, A. D. 1861, as commencing at a certain stake at Burk's blacksmith shop, near C street, in Virginia City, and running thence southerly along and on said Mitchell lode. Together with the dips, spurs, angles and variations thereof, and surface room for the convenient working of the same as a mine, and the appurtenances.

Also, the Comstock lode and any intervening space between

said lodes, or the spaces on either side thereof, upon, in or through which there exist any works, drifts or other developments, together with all such works, drifts or other developments, the same being situate in the Virginia mining district, county of Storey and State of Nevada.

That the defendants, their servants, agents and employees in charge of or working upon or in the aforementioned premises, property, works, drifts or developments, permit the said survey and inspection to be made, and furnish and provide all the means in their possession of ingress and egress and traversing the same, to the said complainant and his employees and attendants aforesaid, each day, for the period hereinafter limited; and that this order take effect and be in force and binding upon all parties and persons upon the presentation to them, or any of them, of this order; and that the same continue in force for the period of five successive days on which such inspection and survey is being made.

Let the defendant show cause before me, at my chambers in the City of Virginia, on Friday, the 25th day of January instant, at ten o'clock A. M., why the above moved-for order should not be granted.

ALEX. W. BALDWIN,
United States Judge, District of Nevada.

PROCEEDINGS, ON RETURN OF THE RULE.

At 10 o'clock of the return day of this rule, and in response thereto, the complainant, by Messrs. Mesick and Seely, and the defendant, by Messrs. Hillyer and Whitman, came before the judge at his chambers.

All these gentlemen are solicitors of this court. The complainant, through his solicitors, formally made his application for the order of survey. Mr. Hillyer, on behalf of the defendant, requested the judge to postpone the hearing until additional associate counsel could be procured from San Francisco. A postponement for several hours was allowed, to enable the defendant's solicitors to prepare an argument in opposition to the order. When the hour arrived to which the hearing had been adjourned, the solicitors of the parties again came before the judge. In opposition to the application Messrs. Hillyer and Whitman presented the affidavit of Mr. Charles Bonner, drawn by them, of which the following is a copy:

AFFIDAVIT OF CHARLES BONNER, OPPOSING INSPECTION.

United States of America. In the Circuit Court of the United States for the District of Nevada. In Equity.

Wm. B. Thornburgh, complainant, *v.* The Savage Mining Company, defendant. In the matter of the application of the complainant for an order of survey. Before Justice Baldwin, sitting in chambers.

Now comes Charles Bonner, superintendent of the defendant, the Savage Mining Company, and having charge of its litigation in the State of Nevada, and being first duly sworn deposes and says, that he is informed and believes, and so charges the truth to be, that William B. Thornburgh, complainant above named, is not the real party in interest in the premises he seeks to recover. That he is not the owner thereof; that he paid no consideration therefor; that the same have been transferred to him; that, being the nominal and apparent legal owner, he might bring suit, as he hath done, before the Circuit Court in and for the District of Nevada. That defendant desires to make issue with said complainant upon such point of ownership in order to test the truth thereof and to compel a dismissal of this suit in event the fact be according to the information of the defendant. That for such purpose affiant desires to proceed by bill of discovery, plea to the jurisdiction of said court, or application for injunction in equity, as he may be advised after full, fair and free statement of defendant's case to its counsel and under their advice. That notice of this application was given to defendant at nine (9) o'clock P. M. of the twenty-fourth instant, and not before; that the papers in the suit to which this application is auxiliary were served on the defendant on the twenty-third instant, and copies thereof transmitted by affiant to San Francisco so soon as they could be prepared; that defendant hath twenty days from the service of said papers, exclusive of the day thereof and of Sundays, within which to appear in such causes; that the principal counsel of defendant reside in San Francisco; and that it is necessary, for the proper appearance and defense of defendant, that they should be consulted before the defendant takes any definite action in the premises; that to decide upon the course of defendant's action will take more time than is allowed for the

hearing of this motion, which is set for four P. M. this day instant; that to make the order asked by complainant, or any order of such nature, would inflict upon defendant great hardship, inconvenience and expense, namely, an expense of not less than five hundred dollars per day; that such order should not be made unless the complainant hath the right of action in the suits referred to, and that defendant should be allowed a reasonable time to appear in such suit and be heard therein upon the preliminary question of complainant's right before he is required to respond to this motion or before the same is granted.

To the end, therefore, that defendant may have opportunity to test complainant's real character and position with regard to the property in controversy, defendant asks that the hearing of the motion be postponed for such time as may be reasonable for the ascertainment of such fact, and until proof touching the same can be heard. Affiant further shows that he is a practical miner, and has been engaged in such business for twelve years last past; that for four years last past he has been engaged in such business in the county of Storey, State of Nevada; that he is well acquainted with the works of the mine of defendant, and the developments therein; that there is no other lode than the Comstock lode therein, and that defendant is not now working upon or extracting ore from any lode or lead of mineral-bearing rock other than the Comstock; that neither complainant nor his predecessors in interest, nor the locators of the Mitchell lode, so called, or any other person or persons, have ever done any work or made any explorations upon said Mitchell lode, or in search therefor, within the boundaries of defendant's mining claim, or within the boundaries set forth in complainant's complaint, as affiant is informed and believes; that defendant hath had open, notorious, exclusive and uninterrupted possession, custody and control of the place where it is now working, and of all places where it has done work, adverse to all the world, for more than three years last past; that all the work done by defendant is laid down upon maps drawn by competent surveyors, which heretofore have been kept in the office of the company open to public inspection, as complainant well knows; that from time to time during the last year many persons have

visited the workings of the defendant, and there has been no concealment thereabout; that complainant could have visited the same at any time prior to the commencement of this suit, had he so desired, as he well knows; that affiant is informed and believes, and so charges the truth to be, that the object of complainant in seeking this order is to annoy and harass the defendant, to hinder its workings, or for some other object or purpose contrary to equity and good conscience.

CHARLES BONNER.

(*Jurat.*)

FURTHER PROCEEDINGS ON RETURN OF THE RULE.

The complainant's solicitors were then given until seven o'clock to procure rebutting testimony.

At this hour the parties again came before the judge, and the complainant's solicitors presented this affidavit, traversing most of the statements in that of Mr. Bonner. The argument then proceeded—Mr. Mesick, for the complainant, urging the judge to grant the order; Mr. Hillyer, for the defendant, resisting it.

The argument concluded, the judge took the matter under advisement, and the next day decided that the plaintiff was entitled to the order of inspection and survey, in the form applied for, and ordered it to issue in the action.

The order was served upon the solicitors and superintendent of the defendant, and for three days it was obeyed. On the twenty-sixth day of January, the Savage Mining Company, by Hillyer & Whitman, its solicitors, filed in this court its bill against William B. Thornburgh, of which the following is a copy:

CROSS-BILL FOR DISCOVERY AND TO ENJOIN PROCEEDING ON THE ORIGINAL BILL.

United States of America: In the Circuit Court of the United States for the District of Nevada—in Equity.

The Savage Mining Company, complainant, v. Wm. B. Thornburgh, defendant.

To the honorable the judges of the Circuit Court of the United States for the District of Nevada:

Your orator, the Savage Mining Company, shows to this honorable court that it is a corporation, incorporated in the State of California and under the laws thereof, and having its principal place of business in said State, and is a citizen thereof; that William B. Thornburgh, the defendant, is a citizen of the State of Nevada.

Your orator further shows that it is now, and for five years last past has been the owner, entitled to the possession and in the possession of a certain mining claim and quartz lode situate in the county of Storey, said State, known as the Savage claim, and described as follows: Eight hundred (800) feet in length upon the quartz lode commonly known as the Comstock lode, bounded on the north by the Gould & Curry claims, and on the south by the Hale & Norcross claim, and including all the dips, angles and spurs of said lode between said north and south boundaries.

Your orator further shows, that on the 23d day of this month the defendant, William B. Thornburgh, commenced an action in this honorable court against this complainant, the nature of which action fully appears from the complaint therein, a copy of which is hereto attached, marked exhibit "A."

Your orator further shows, upon information and belief, and avers the fact to be, that the said William B. Thornburgh is not in fact the real owner of the property described in said complaint, nor the real party in interest in said action; but that the real parties in interest as complainant in said action are other parties whose names are unknown to this complainant, and who are citizens of California, and not of the State of Nevada.

Your orator further shows, upon information and belief, and avers the fact to be, that shortly before the commencing of said action the real parties in interest as complainant in the same, and the only parties besides this complainant owning or making claim of ownership to said property, for the fraudulent purpose of enabling said actions to be commenced in a court of the United States, and for no other purpose, executed or procured to be executed to said Thornburgh a conveyance or conveyances of the said property by deed or deeds of conveyance purporting on their face to convey the title to said property, but which in fact were merely colorable and

made, not to convey any real interest in the same, but solely to invest said defendant with a nominal title in order that the action against the complainant might be brought in the Federal court instead of being brought in the court of a State.

Your orator further shows, that it is desirous of contesting the jurisdiction of the said honorable court in said action, and procuring a dismissal of the same upon the ground that the real parties in interest in the same are not citizens of different States, as therein alleged, which fact would appear if the said William B. Thornburgh would discover and set forth the real condition of the title to said property upon which he bases his right to recover therein, and that for the proof of said facts a discovery by the said defendant in the manner herein prayed for is material and essential to this complainant.

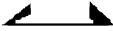
In consideration whereof, and forasmuch as your orator is remediless in the premises at common law, and can not have a complete discovery of the condition of said title without the aid of this honorable court, and to the end that said William B. Thornburgh may, upon his corporal oath, full, true, direct and perfect answer make to all and singular the matters and charges aforesaid, and that not only to the best of his knowledge and remembrance, but also the best of his information and belief, particularly that the said defendant may discover and set forth in manner aforesaid:

First. Whether he is in fact the real and true owner of the said property upon which the right to recover in said action is based in said complaint, and whether other parties, and if so what parties, are the real, equitable and beneficial owners of the same.

Second. Whether he, the defendant, is the sole beneficial owner of the said property and title, and whether other parties are not legally or beneficially interested in the same, and if so, what parties, and what is the extent and character of their interest, and what is their place of residence.

Third. At what time, place, from whom and by what means the said defendant obtained the title which he sets forth and relies upon in said action.

Fourth. What was the consideration, if any, paid by defendant for said title, and when, where and under what circumstances was the same paid.



Fifth. What were the negotiations which took place in reference to the obtaining of said title by defendant, and with whom said negotiations were made, who were present at the time the said negotiations were conducted, and what conversation was then or previously had in the presence of defendant in reference to the object of making a transfer to said defendant, and in reference to the beneficial interest in the said property which should be had by the defendant or by other parties.

Sixth. Whether said defendant has in his possession or control, or knows of the existence of a certain deed from one Charles Lintott to one Thomas Farrel, purporting to convey the title to said property, and if so, whether defendant has any knowledge or belief, and if so what, as to the real consideration of said deed and as to the purpose and objects for which the same was paid.

Seventh. Whether said Thomas Farrel made a conveyance of said title to defendant, and if so, at what time and place it was made, and who were then present, and what then or in that conversation was said to, or in the presence of defendant in reference to the objects and purposes of said conveyance.

Eighth. Whether the consideration mentioned in said deed from Farrel to defendant was ever paid, or any part of the same, and if so, at what time, place and to whom.

Ninth. Whether the defendant has not made a contract with one or more persons, either written or verbal, by which said other persons bear the whole or some portion of the expense of litigating said action, or the purchase of said title, or are to have an interest in the said property, or in the benefits accruing from the litigation of the same with this complainant, and if so, what is such contract, and when and with whom was it made.

Tenth. Whether one C. L. Low is not, to the knowledge or belief of the defendant, a real party in interest in said title to said property and in said litigation, and if so, the character and extent of said interest and when and how acquired, and of what State the said Low is a citizen.

Eleventh. Whether it was not stated or understood, either at the time of taking the conveyance from said Farrel or dur-

ing the negotiations for the same, that the real object of making the same was to enable the said action to be brought in the Circuit Court of the United States for the State of Nevada.

And that the said Wm. B. Thornburgh may make a full and true disclosure and discovery of the several matters aforesaid, to the end that your orator may be better enabled to show the want of jurisdiction by this honorable court of said action, and that in the meantime and until the said Thornburgh shall have made such discovery as aforesaid, that he may be restrained by the order and injunction of this honorable court from further proceedings in the said action and all orders therein.

May it please your honors to grant your orator, not only the most gracious writ of injunction issuing out of this honorable court, according to the form of the statute in such case made and provided, and under the seal of this honorable court to be directed to the said Wm. B. Thornburgh, restraining him, his servants, agents, attorneys and every of them, from proceeding further in said action, or under any order made in the same, but also a writ of subpoena of the United States of America, to be directed to the said Wm. B. Thornburgh, thereby commanding him at a certain day and under a certain pain, therein to be specified, personally to be and appear before your honors in this honorable court and then to answer all and singular the premises, and to stand to, perform and abide such order therein as to your honors shall seem meet, and your orator shall ever pray, and complainant prays, for such other relief as may to your honors seem proper.

HILLYER & WHITMAN,
Solicitors for Complainant.

United States of America, State of Nevada, County of Storey, ss.

Charles Bonner, being first duly sworn, deposes and says that he is the superintendent and general managing agent of the Savage Mining Company, the complainant in the above entitled action; that he has heard read over the foregoing bill of complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters

therein stated on information and belief, and that as to those matters, he believes it to be true.

CHARLES BONNER.

(*Jurat.*)

PROCEEDINGS ON THE CROSS-BILL AND IN CONTEMPT.

Appended to and made a part of this cross bill, was the original bill in the action. The cross-bill was by the solicitors of the Savage company presented to one of the judges of this court, and an injunction in accordance with its term asked for. This was denied. Then for the first time the Savage Mining Company closed its works, and in disobedience of the order of survey denied admittance to the complainant and his attendants. The corporation, and also Mr. Bonner, the superintendent and general managing agent, were cited to appear before the court and show cause why they should not be punished for contempt, and while the former made no appearance, the superintendent undertook to purge himself on the grounds that he was acting under the advice of counsel, and that in their and his estimation the order of survey was void, because this court at the time of granting it had not acquired jurisdiction of the person of the defendant.

The court held that it had acquired jurisdiction, adjudged Mr. Bonner, the superintendent, guilty of the contempt charged, and imposed upon him a fine. The court also adjudged the corporation, the Savage Mining Company, to be in contempt, and for the purpose of compelling obedience to its authority, ordered a writ of *distringas* to issue against the property. For the purpose of preventing the execution of this writ by the marshal of the United States, the defendant invoked the authority of a State court, but the tribunal appeared to decline to interfere.

POINTS MADE BY THE RESPONDENTS.

On Tuesday, the 15th day of February, this court convened at Carson City. The complainant exhibited his rule to show cause on the injunction, properly served upon the superintendent and general agent of the corporation, defendant, and upon its solicitors, H. and W., and moved for an injunction thereon. Pending the determination of this motion, Mr. Hillyer ob-

tained leave to make a special appearance and submit a motion to quash all proceedings in the action, on the grounds—

First. That the court has no jurisdiction of the case.

Second. That the court has no jurisdiction of the person of the defendant.

Third. That no service has ever been had on the defendant.

Fourth. That no service ever can be had on the defendant.

This motion was by the court overruled, and complainant renewed his motion for an injunction. As Mr. Hillyer, the generally retained solicitor of the defendant, was present, the judge desired to know if he desired to make any resistance to the granting of the injunction, intimating that time and opportunity for a trial upon the merits would be offered, to which it was responded in the negative, unless the court would permit the defendant to contest the application for an injunction without holding it to a general appearance in the action. Inasmuch as the sole object of the action was to obtain an injunction, it was not competent for the court to allow that object to be resisted by the defendant, without being permitted to a general appearance in the cause. Besides, the court had already distinctly held, that the defendant had generally appeared. The complainant renewed his motion for the injunction, and the court ordered it to issue in the form prayed for.

OPINION AS TO VIEW AND INSPECTION.

The foregoing statement comprises the facts which, up to this period, have occurred in this case. The propositions of law which they involve are:

First. Ought a court of equity, in a mining case, when it has been convinced of the importance thereof for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law.

That a court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind will not be denied. And the propriety of exercising

that power would seem to be clear, indeed, in a case where without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined can not be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth—the issue between the parties. Can a court justly decide a cause without knowing the facts? And can it refuse to learn the facts? But one adjudication of this subject can be found in the books, and this is in conformity with the views here expressed, viz., Bainbridge on Mines.

Of course, before granting an order of this kind the court must be satisfied that the application is made in good faith, and in granting it will pay due regard to the convenience of the party affected.

The next question in this case, and the most important one which has occurred, is as to the jurisdiction of this court over the person of the defendant.

OPINION AS TO JURISDICTION AND APPEARANCE.

Has this court acquired such jurisdiction? The negative of this proposition has been vehemently urged by the defendant's counsel. This is conceived to be a fair statement of their position. They submit:

First. That the judicial act of 1789 provides that no suit shall be brought against an inhabitant of the United States by original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

Second. That the defendant is a corporation, organized under the laws of the State of California, and that it can not exist or be found beyond the limits of that sovereignty. While this court is of opinion that the defendant was, within the meaning of the foregoing provision of the judicial act, found in this district at the time process was served, even if such were not the case, the court, by defendant's voluntary appearance, had acquired jurisdiction before the want of it was suggested.

Judge Conkling, in his treatise on U. S. Courts, page 127, in discussing the provision under consideration, holds it not to be restrictive of the jurisdiction of the court, but taken together, merely to import that process for the institution of a suit at law, or in equity, shall not run beyond the limit of the district for which the court from which it issues is held. The author continuing, says: "This prohibition, as already intimated, has been adjudged not to amount to a denial of jurisdiction over causes otherwise in themselves cognizable in the national courts, but only to a privilege given to the defendant; of which, however, he must avail himself at the outset or he will be held to have waived it." An appearance, therefore, by a defendant, and answering, generally, without objection, has been always considered to be a waiver.

In *Gracie v. Palmer*, 8 Wheaton, 699, the court say: "It is not necessary to aver, on the record, that the defendant in the circuit court was an inhabitant of the district, or was found therein, at the time of serving the writ. Where the defendant appears, without taking the exception, it is an admission of the regularity of the service." This is the tenor of all the authorities, nor indeed has their effect been disputed by any counsel in this case.

Prior to the taking of any exception to the jurisdiction of the court, the defendant, in response to a rule to show cause, addressed to it, why an order in the action should not be allowed, had, by generally retained counsel, solicitors of the court, appeared before the judge, and in opposition to the order, introduced testimony and made argument.

From the very testimony introduced, the affidavit of Mr. Bonner, drawn by the solicitors, it appears that the defendant had been served and proposed to answer. Does this not show a voluntary submission to the authority of the court?

The order of survey was evidently regarded by this defendant as an important step in the litigation. It was strenuously resisted. Not only was this jurisdictional exception not suggested then, but all opposition to the granting of the order having been found ineffectual, the authority of the court was recognized and admitted by obedience to it. Does this not indicate that the defendant waived his privilege to hold itself beyond access by the process of this court? The defendant

could very easily have found means to suggest to the judge the fact of its residence beyond the reach of his process, and the consequent impropriety of allowing the action to proceed against it. But it rather chose to appear before him and contest the order on its merits. That this appearance was general and for every purpose of the action, is manifest from the fact that it was unreserved and unrestricted by any limitation.

A voluntary appearance by a defendant consists in his submitting himself to the authority of the court, and the manner of entering it is usually regulated by rule. But it by no means follows that a party may not be held to appear in an action without formally complying with such rule. See 1 Barb. Ch. Prac., 77, 82, 87.

In *Tallman v. McCarty*, 11 Wisconsin, 401, it was held that making a motion in a case was an appearance.

In *Cooley v. Lawrence*, 5 Duer, 605, the court, after reviewing the authorities, says: "All these authorities show that the question is whether the appearance of the defendant has been an act importing that he submits the determination of a material question of his case to the judgment of the court."

Asking for a continuance in a cause is held in Iowa to be a full appearance: *Hotchkiss v. Thompson*, Mor. 156; *Almer v. Hiatt & Harbine*, 4 Greene, 439; H., 382; H., 441. Also that moving to suppress depositions, or to call into action the power of the court for any purpose except to pass upon its jurisdiction is an appearance.

See also 4 Cal. 304, 306. But in this action the defendant has actually appeared upon the record; for its cross-bill, which has been set forth in this opinion, is to all legal intent an answer in this cause.

Says Daniell in his Chancery Practice, Vol. 2, 1649: "A cross-bill is a mode of defense. The original bill and the cross-bill are but one cause. If a cross-bill be taken as confessed it may be used as evidence against the plaintiff in the original suit, on the hearing, and will have the same effect as if he had admitted the same facts in an answer."

To sustain the doctrine of the text the author cites many respectable authorities.

In *Cockrell v. Warren*, 1 Ark. 346 (quoted in note to Dan. Ch. P. 1649) it was held, that when a defendant files a cross-

bill on matters clearly cognizable in equity, the cross-bill will supply any defect in jurisdiction, and place the whole cause before the court, and impose the duty of granting relief to the party entitled: 2 Carter, 90; 2 Barb. Ch. 127, 136; Story's Eq. Pl. 389, 390.

It is the opinion of this court that it acquired jurisdiction of the person of the defendant by virtue of the service of the subpoena upon its superintendent and general managing agent. In other words, that by such service the defendant was found in this district within the meaning of the Judicial Act of 1789. The force of the argument of defendant's counsel, based upon a literal and rigid construction of the language of that statute and of the constitution, is candidly admitted. But the Supreme Court of the United States has not so construed them. If it had not done so, in no case could a corporation be a party to a suit in the national courts.

The constitution of the United States limits the jurisdiction of the Federal courts, so far as respects the character of the parties in this particular case, "to controversies between citizens of different States." That a corporation can in any sense be considered a citizen no one has ever claimed. That a corporation is a unity, independent of and distinct from the individuals who have created it, and who are interested in it, is equally well settled.

"That in a corporation all the parties are not the whole is not only true of its conduct or administration; it is also true of its rights of property. They are referred, not to all the members, but entire and undivided to the judicial person, as a unity in law."

Hence for the purpose of a suit, the corporation must appear by its constitutional organs or curators; the appearance of each and every member is no appearance at all: Bro. Corporation, 28; Co. Lit., 66 b.

Notwithstanding this definitive and perfectly established legal status of a corporation, and of its relations to its members, the Supreme Court, in the leading case of the *Bank v. Deveaux*, 5 Cranch, 61, and in all subsequent decisions involving the question, has held that Federal courts will look beyond the charter to see whether the individual members are citizens who have a right, under the constitution, to sue in

those courts; and the court has so decided in all of these cases, as will appear from an analysis of them, for the purpose of advancing the remedy in the national tribunals and preventing a failure of justice therein, and for no other purpose.

It is a matter of regret that the briefs of the eminent counsel in the *Bank v. Deveau*, are not contained in the report of that case; but we are told upon the authority of a contemporary, Attorney General Legare, that their great argument there was, "that a corporation, not being a citizen of a State under the constitution, if the court did not look beyond the charter to the individuals who composed the company, there would be a denial of justice in a great number of the most important cases." And indeed that it was this view which controlled the decision, is sufficiently evident from the language of the great judge who delivered the opinion.

Says Chief Justice MARSHALL: "The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws."

A constitution, from its nature, deals in generals, not in detail. Its framers can not perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

The judicial department was introduced into the American constitution under impressions and with views which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the States will administer justice as impartially as those of the nation to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and citizens of different States. Aliens or citizens of different States are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision because they are allowed to sue by a corporate name. That name, indeed, can not be

an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.

In *Marshall v. Baltimore and Ohio Railroad Company*, 16 Howard, 326, it is said by Mr. Justice GRIER:

"By the constitution the jurisdiction of the courts of the United States is declared to extend *inter alia* to controversies between citizens of different States."

The Judiciary Act confers on the circuit courts jurisdiction "in suits between the citizens of the State where the suit is brought and a citizen of another State."

The reasons for conferring this jurisdiction on the courts of the United States are thus correctly stated by a cotemporary writer (Federalist, No. 80): "It may be esteemed as the basis of the Union 'that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.' And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow that in order to the inviolable maintenance of that equality of privileges and immunities, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens."

These authorities are considered sufficient, although more might be cited, to show the length to which the Supreme Court has felt justified in going in order to effectuate the substantial guaranties of the constitution so far as access to the national courts was concerned. To secure the remedy to these tribunals, it has divested a corporation of its cardinal and essential characteristic—perfect ideal unity. Conformably with the reasons and principles which have influenced the Supreme Court in the cases cited, it is believed that the process of this court can reach the defendant—that it may be "found" within this district.

The Savage Mining Company is a corporation organized under the laws of California. The purpose and object of its organization, as declared in its charter, is mining in the State of Nevada. Its property, consisting of a mining claim, mills, etc., is all situated in this State. Through a superintendent and general managing agent resident here, it holds possession of its property, makes contracts, and carries on a general and extensive business.

If the defendant can not be reached by the process of this court, there is an utter failure and denial of justice; for the property in controversy being situated within the State, and the distinction between local and transitory actions having always been recognized in the Federal courts, none could be maintained in the district of California: Conkling's Treatise on United States Courts, page 172.

Thus, while the corporation, by a strained construction of the constitution in its favor, is allowed free access to the national courts, the citizen, by a forced and narrow construction of the Judicial Act, is denied all redress.

Surely, the courts will not, when, for the purpose of advancing the remedy and doing justice, they have opened their doors to corporations, invest them in this way with absolute immunity from legal procedure.

Much more reasonable is it to hold that a corporation is "found" where it transacts its business through an officer having general charge thereof, where its property is situated which may be taken on execution, where it makes its contracts which are liable to be litigated. Indeed, if language is to be construed as literally as counsel insist, a corporation can be "found" nowhere. It is a metaphysical entity no more susceptible of being handled, seen or corporally touched than a will-o'-the-wisp.

How could this corporation be "found" in the district of California? If it be answered, by service upon some officer thereof, as authorized by the statutes of that State, still there would be no compliance with the literal meaning of the Judicial Act, nor could a judgment obtained upon such service, however binding upon the person of the corporation, ever be enforced, because its property is all situated within another jurisdiction.

So that it being actually and physically impossible to find a corporation anywhere, the question is, what will the courts, animated by a desire to advance the remedy and do justice, consider a "finding" of a corporation?

If it be by legal fiction that the corporation be found at all it would certainly seem just and reasonable that it should be found in some jurisdiction where judgment against it may be enforced.

If the position taken by defendants' counsel be correct, a corporation, by having its officers in one State and all its property in another, could escape amenability to the process of all courts.

The thirteenth section of the Attachment Law of New Hampshire provides that "when any corporation or body politic within this State shall be possessed of any money," etc. The Supreme Court of that State, in 9 New Hampshire, 397, held that this clause of the statute was not confined to corporations created by the laws of that State, but included any corporation having property there or suable there. The clearness and force which characterizes the opinion in that case, and its general application to the question under consideration here, justify an extended quotation from it.

WILCOX, J.

This case involves the inquiry whether a foreign corporation can be sued in this State. It has been held in Massachusetts (*Peckham v. North Parish, in Haverhill*, 16 Pick. 286,) that a foreign corporation can not be sued in that State. Such also seems to be the doctrine in New York: *McQueen v. Middletown Man. Co.*, 16 Johns. R. 5.

The only reason given for these decisions is, that no writ can, by their laws, be legally served against a corporation in another State. Such process, it is said, must be served on its head or principal officers within the jurisdiction of the sovereignty where this artificial body exists; and "if the president of a bank of another State were to come into New York, his functions would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived his character." The question has been adjudged in

favor of the liability of a foreign corporation in Pennsylvania: *Buskel v. Commonwealth Ins. Co.*, 15 Ser. & Rawle, 176. It has often been held that a corporation may sustain a suit beyond the jurisdiction within which it was constituted. A Dutch corporation was allowed to sue in England: *Dutch W. I. Co. v. Moyes*, 2 Ld. Raym., 1535; 1 Str. 612; and the same doctrine has been held more recently in regard to foreign corporations: Chit. on Cont. 86; 1 R. & M. 190. See, also, 2 Rand. Rep. 465; 10 Mass. 91; 4 Johns. Ch. Rep. 370; 6 Cowen, 46; 17 Mass. 97.

We have also recognized the right of a foreign corporation to hold estate, real and personal, within this State: *Lumbard v. Aldrich*, 8 N. H. R. 31.

There is "nothing in the character of a corporation to prevent its suing or being sued like a natural person. It is, in legal contemplation, a person having existence, invested with rights and subjected to liabilities, and very properly a party to proceedings in courts of law or equity, whenever those rights or liabilities are drawn in controversy."

And if, upon principles of law and comity, corporations created in one jurisdiction are allowed to hold property and maintain suits in another, it would be strange indeed if they should not also be liable to be sued in the same jurisdiction. If we recognized their existence for the one purpose we must also for the other. If we admit and vindicate their rights, even handed justice requires that we also enforce their liabilities, and not send our citizens to a foreign jurisdiction in quest of redress for injuries committed here.

There may be difficulties in procuring legal service of a writ upon a foreign corporation; and so, in case of an individual residing in a foreign jurisdiction, it may be difficult or impossible to procure such service of process upon him as to subject him to the jurisdiction of our courts. But in either case, when the service can be made, or when the person or corporation appears and submits to our jurisdiction, we see no objection to the authority of the court to proceed.

If a citizen of another State is found here, and process is served on him personally, that gives the court jurisdiction. It may well be doubted, however, whether the casual presence of the principal officer of a foreign corporation here and ser-

vice upon him, would be sufficient. But if the corporation have estate here, or if it send its officer, upon whom, by our law, process is to be served, to reside here and transact business upon its account, we can not see why an attachment of such estate, or service upon such officer, may not be sufficient.

The same difficulty in regard to the service of a writ does not exist here as is found in Massachusetts and New York. Our State laws, 87, provide, "that when any body, politic or corporate, are sued in this State, who have no clerk or member residing therein on whom service can be made, an attested copy of the writ shall be delivered to the agent, overseer or person having the care or control of the corporate property, or part thereof, in this State."

It is objected that the thirteenth section of the act directing proceedings against trustees of debtors, does not extend to foreign corporations. That section provides that "when any corporation or body politic, within this State, shall be possessed of any money," etc. We are of opinion that this clause of the statute is not confined to corporations erected by the laws of this State; but that any corporation having any property here is, within the meaning of this statute, a "body politic within this State."

The whole stress of defendant's position rests upon the assertion that it can not exist beyond the boundaries of the sovereignty which created it, and authorities are cited in support of this proposition, which it is not deemed necessary to dispute. In view of the appalling consequences which might ensue therefrom, this court will hesitate long before it decides that a corporation can exercise no powers beyond the State which charters it. Indeed that it may do so is expressly decided in the case of *Bank of Augusta v. Earle*.

If the corporation exercise powers in this State, it must do so through an officer or agent. If this officer or agent be competent to represent the corporation here in making contracts and holding property, why may he not be said to represent it when the enforcement of its liabilities is sought, especially when it is considered that a corporation is at best a myth, can be literally found nowhere, can not, in the case of a local action, be prosecuted to judgment where chartered, and that even if it could be, the judgment could never be en-

forced against it? The defendant makes contracts here. It practically enjoys all of the privileges which could be enjoyed by a natural person, inhabitant here. All this it does by the permission of this State, and through the agency of an officer resident here, who is invested with plenary powers. In other words, under the decision of the *Bank of Augusta v. Earle*, the defendant, though a resident in another sovereignty, may, through its agents, hold property and make contracts here, provided this State acquiesce in so doing. Inasmuch as this State does, by acquiescence, accord to the defendant these great privileges by every principle of equity, upon the occurrence of litigation growing out of the exercise of these privileges it should be stopped from asserting that it can not be found within the State.

Yet another reason for holding the service as made to be effectual upon the defendant consists in the fact that this court has by rule adopted the Civil Practice Act of this State. By section 29 of the act to regulate proceedings in civil cases, page 318, Nevada Statutes of 1861, it is provided, that the summons in an action may be served upon a corporation by delivering a copy thereof to its superintendent or general managing agent. In Conkling's Treatise, page 81, the author says: "It is proper, however, here to observe, that there is one description of cases attended by circumstances so peculiar as to have been deemed sufficient to warrant a departure in practice from the strict letter of this enactment. Where a party residing out of the jurisdiction of the court has obtained a judgment at law, which is sought to be enjoined by bill in equity filed by defendant in judgment, on the equity side of the court, or, where a non-resident has instituted a suit in equity and a cross-bill is filed by the defendant, in such suit the court, upon motion, will order that a service of the subpoena upon the attorney or solicitor of such non-resident party shall be sufficient." *Hitner v. Suckley*, 2 Wash. C. C. Rep. 465; *Eakert v. Bauert*, 4 Wash. C. C. Rep. 370; *Ward v. Seabry*, Ib. 426; *Read v. Consequa*, Ib. 174.

An examination of the case referred to and considered as authority for the text, shows clearly enough that the court predicated the validity of a service upon the solicitor of a party neither found within nor an inhabitant of the district

upon its adoption of the rules of English chancery practice. Thus have the Federal courts kept step with the progress of the age. In order to preserve the substantial guaranties of the constitution, and to prevent a denial of justice, they have enlarged its terms and gone beyond its letter. They have not permitted that important category of cases which embraces corporations to be excluded from their jurisdiction by attaching to the word "citizen" any restricted significance. For the same reasons, and to accomplish the same end, they have, as has been seen, departed from the letter of the limitation imposed by the Judicial Act. They have frequently repudiated the fact of the State courts being open to suitors as affording any argument against their exercising, in behalf of such as preferred their tribunals, a not expressly warranted jurisdiction.

In conformity with these principles a stronger case than the one at bar for the exercise of the jurisdiction of this court, can not easily be conceived. The case of *Day v. The Newark India Rubber Manufacturing Company*, 2 Blatch. C. C. R., relied on by the defendant's counsel, is not considered in point, for these reasons: First, the service in that case was upon an officer of a corporation, who casually came within the jurisdiction—the State of New York. Second, the laws of the State of New York provided no means for serving process upon a non-resident corporation. Third, the action was transitory, and no failure of justice would occur in remitting the complainant to the circuit court for the district where the corporation resided. In each and every one of these essential respects that case diametrically differs from this. The importance of the main question involved is perhaps a sufficient excuse for the length of this opinion. It only remains to be said that the calm and studious reflection which the preparation of it has involved has only served to strengthen and confirm my belief in the correctness of the rulings which have been made in the action.

¹EARL OF LONSDALE V. CURWEN.

(3 Bligh, O. S., 168. High Court of Chancery, 1799.)

Obstructions—Ventilation. Order for inspection of coal mines, the defendant being compelled to remove obstructions and to open the air courses.

In this case the Earl of Lonsdale had filed a bill against J. C. Curwen, Esq., by which, and the affidavit of John Walker, it appeared that the Earl of Lonsdale was seized of the manors of Seaton and Stainburn, and certain closes called the Clossoks lying on the south side of a rivulet called the Mill Race, near Workington, which divides the manors of Seaton and Workington; that there were mines of coal lying under the Clossoks belonging to the Earl of Lonsdale, and that J. C. Curwen was seized of lands on the south side of the Mill Race, under which there were mines of coal; that John Walker (who made the affidavit) had for several years been employed by Mr. Curwen as director of his collieries under ground, and in particular of that part of his collieries where his coals were raised at a colliery called John Pit, and from whence about five years previously, by the direction of Mr. Curwen, he had caused the working of the said pit to be extended and carried into and under the closes called the Clossoks for the length and space of forty yards and upward; and also caused large quantities of coal to be dug out and taken from under the closes called the Clossoks, to the amount of 600 wagons or 2,100 tons, of about the value of £300 or upward; that having been directed by Mr. Curwen to extend the workings further under the Clossoks, he had remonstrated with Mr. Curwen against his doing so, on which Mr. Curwen had engaged one Edmund Bownass, who had the direction of the E. of L.'s collieries at Clifton,

¹ This case and the one next following are printed as notes to the case of *The East India Co. v. Kynaston*, 3 Bligh, O. S., 153, in which an inspection of warehouses was allowed; with the further ruling that the order of inspection could not be executed by force, but by compulsion against the person by process for contempt, if resisted.

about two or three miles from Workington, to take the charge and direction of the working under the Clossoks; that E. B. afterward proceeded to have the workings carried on under the said closes to the extent of about 212 yards in length, and in breadth to an average of about 105 yards, and that in consequence of such workings, the greatest part of the coals which had been raised at the John Pit for the preceding two years had been dug out of and from under the Clossoks, amounting to 6,000 wagons and upward, of the value of £3000 and upward, over and above the £300 before mentioned; that Mr. Curwen, about the 13th of August then last, gave orders and directions to the workmen employed in the workings under the said closes to rob or take away several of the pillars which had been left, for the carrying on the workings, and which they had ever since been and then were doing, by which means the workings would be destroyed, and it would be rendered impossible for any person to discover the extent of the workings, or the quality of the coals dug and taken away thereout; that Mr. Curwen, in a conversation with John Walker about taking away the coals under the said closes, and the danger of a discovery thereof, asked him whether he (Mr. Curwen) could not drown the workings by letting the water out of his own collieries into the workings, which would prevent any discovery thereof from ever being made, which deponent said he (Mr. Curwen) might do, on which Mr. Curwen directed him to go on; that Mr. Curwen, by letting the water out of his own collieries into the workings, would ruin and destroy the workings of very large quantities of coal belonging to the E. of Lonsdale, to a very large and almost inestimable amount. It also appeared by affidavit of J. B. Garforth, that the plaintiff was seized, etc., and that the defendant, without permission, was then digging and carrying away coal from under the lands, against the will of the plaintiff.

The bill prayed an injunction to restrain the defendant, his servants, etc., from digging or getting coal in or under any of the premises in question, or any part thereof, and particularly from robbing or taking away the pillars which had been left in the workings, and that the plaintiff, his, etc., might be at liberty to inspect the workings of defendant under, etc.

Upon a motion for the purpose expressed in the prayer of the bill, it was ordered, that an injunction should be awarded to restrain the defendant, his servants, etc., from digging or getting coals in or under any of the premises in question, or any part thereof, and from carrying on any workings, and in particular from robbing or taking away the pillars which had been left in the workings under the plaintiff's parcels of land in question, until the, etc., and that the plaintiff, his servants, etc., should be at liberty to inspect the workings of the defendant under the plaintiff's inclosures called the Clossoks: Reg. Lib. A, 1798, p.

By an order, dated the 7th June, 1799, reciting the foregoing order of the 20th April 1799, and that it was alleged that John Howard, etc., as agents on behalf of the plaintiff, on the 29th of April, had proceeded to inspect the workings of the defendant, in, etc., but were prevented from completing such inspection, because the pipe or air-course which conveyed the pure air had been broken down or taken away, and certain earth, rubbish and other impediments, were lying at the ends, roads, or passages leading to the workings; and that on the 3rd of May, for the purpose of making a further inspection, the agents of the plaintiff had made a demand in writing that the defendant should remove all the obstructions and impediments, and also given notice to the defendant that they should proceed further in the inspection on the 4th of May, but that the defendant had refused to allow any further inspection of the workings by the plaintiff or his agents; and that it was the principal object of the suit to have the extent of defendant's workings under the inclosures ascertained; that it was prayed that the plaintiff, his servants, etc., might be at liberty, as often as should be necessary, to make further other inspections into the workings of the defendant, under, etc., and that in order to enable the plaintiff, his, etc., so to inspect the same, the defendant might be directed to restore the several air-courses theretofore used, and existing within the colliery, and to remove the earth, etc., lying at the ends, roads and passages leading to the workings; and that the plaintiff, his servants, etc., might also be at liberty to use all necessary means to ascertain the workings and the extent thereof. It was ordered that certain persons named in the order should be at

liberty to view the mine, and that such persons as the viewers might think proper to appoint, should attend such viewing of the mine; that the defendant should cause the obstructions to be removed, and open the air-courses as the viewers should think necessary for such inspection; and that the viewers, and such other persons as they should appoint, should be at liberty as often as should be necessary, to make from time to time inspections into the workings of the defendant under the premises of the plaintiff, so as to enable the viewers to make a perfect and complete report of the workings.

No further notice of this case occurs in the register's book; and according to information communicated by Lord Redesdale, the case was compromised by the payment of a large sum for the coals taken from under the grounds of Lord Lonsdale.

The practice in courts of equity of granting orders for inspection of mines, machines, etc., is well settled. But no notice has ever been taken of the point in the books of practice, and no authorities are to be found upon the subject in the reports of cases in equity, except the case in the court below, of *Kynaston v. The East India Company*, as reported 3 Swan, 248, and upon appeal to the House of Lords, now reported in the text (3 Bligh, O. S. 153), and which case, as it relates to warehouses, is distinct from former authorities and new in its kind. Two cases of orders for inspection extracted from the register's book, are therefore subjoined.¹

¹ The first of these cases, *Walker v. Fletcher*, follows in 8 M. R. 1; the other, *Broigne v. Moore*, 3 Bligh, O. S. 178, was a patent case in which a party was allowed to inspect the model of the machine in controversy.

INDEX.

ACCIDENT.

1. *Act of God*.—A guaranty that the principal shall perform a work requiring skill, includes the accidents pertaining to the business, and the guarantor will be excusable only from those inevitable occurrences designated as the act of God. *Janes v. Scott*, 181

ACCOUNT.

1. *It is the practice to pray an accounting* with the injunction, without separate suit at law for damages. *Thomas v. Oakley*, 255
2. *Account of ore dug—Possession*.—Where the bill prays an account of ore dug on complainant's lands, a court of equity will decree it in a proper case but the complainant must show that he is in possession. *Bracken v. Preston*, 268
See INJUNCTION, 19.

ACKNOWLEDGMENT.

1. *Form of acknowledgment*.—The persons who acknowledged the execution of a grant were by the commissioner certified "to be the persons who executed the" deed: *Held*, that the certificate was a substantial compliance with the act under which it was taken. *West Point Co. v. Reymert*, 528

ACT OF GOD—See ACCIDENT.

ADMISSIONS.

1. *Admissions of conspirators*.—The acts and declarations of one of several parties acting in concert in an illegal transaction for their joint benefit, are the acts and declarations of all. *Burns v. McCabe*, 1

ADVERSE POSSESSION.

1. *Adverse possession under color of decree without deed—Temporary occupancy, no disseizin*.—In 1807 a decree was made that the holder of a senior patent convey to the holder of a junior patent with equities, the interfering ground (called an interlock) covered by both patents. No deed was executed under this decree, but plaintiff went into and continued to hold possession though without any actual occupation of the interlock. There was no actual occupancy of the interlock until a purchaser under the defendant in the decree entered and cut the timber in 1836: *Held*, that the title of the party, holding under the decree, was a complete adverse possession to the extent of the limits of his patent, including the interlock. 2. That the temporary occupancy to cut timber was no disseizin. *Anderson v. Harvey's Heirs*, 291

AFFIDAVIT.

1. *Jurat omitted by mistake*.—If an injunction bill has been actually sworn to, the injunction will not be dismissed because the master has omitted to sign the jurat. *Capner v. Flemington Mining Co.*, 263

2. *Chancery practice*.—Upon motion for injunction complainant may read affidavits filed before the coming in of the answer; and after answer filed he may read further affidavits as to matters of waste and other collateral facts, but not on the question of title. *U. S. v. Parrott*, 335

3. *Denial of equities—Affidavits*.—If the answer to a bill for injunction to restrain mining upon a quartz ledge claimed by both parties, denies all the equities of the bill, and the bill is not supported by affidavits, the injunction must be dissolved. *Real Del Monte Co. v. Pond M. Co.*, 452

AGENT.

1. *The knowledge of the agent* of the vendee is as binding upon him as his own knowledge. *Tuck v. Downing*, 85

2. *Declarations of agent beyond the res gestæ*.—The declarations of an agent or servant are admissible against the principal only when they form a part of the *res gestæ*; the admission of a barkeeper as to contents of package left by guest, made to third person, excluded under this rule. *Mateer v. Brown*, 156

3. *Agent applying for patent*.—Though there may be circumstances where an application for patent would not be advantageous to a company, the mere allegation of such fact is not sufficient. *Sherman v. Clark*, 483

4. *Superintendent working without orders*.—If a superintendent be working without any control of the president or board of trustees, it does not follow that the mine is being worked injuriously to the stockholders. *Id.*

See FRAUD 1, 2, 5, 8, 29; MEASURE OF DAMAGES, 1.

AGRICULTURAL CLAIM—See INJUNCTION, 58.

APPEAL.

1. *Copies required on appeal*.—Sending up the original papers on appeal is not to be suffered, even where there is consent. *Emmons v. McKesson*, 409

2. *Showing necessary on appeal*.—To entitle an appellant to a reversal of an order or judgment of a lower court he must make such an affirmative showing as will negative at least the probability of the correctness of such order or judgment, for the presumption is in favor of its regularity. *Lady Bryan Co. v. Lady Bryan Co.*, 478

See INJUNCTION 33, 53, 119; PLEADING AND PRACTICE, 4.

APPROPRIATION—See HIGHWAYS, 4.

APPURTENANCES.

1. *Ore banks passed as appurtenances*.—In his declaration in partition the plaintiff demanded "The Mount Hope Estate," setting out the particular tracts and not the ore hills, but averred that each tenant was entitled to one eighth of the premises with the "appurtenances": *Held*, that the right to the ore in the mine hills passed under "appurtenances." *Grubb v. Grubb*, 226

ASSIGNMENT.

1. *Assignment before garnishment*.—An attaching creditor has no precedence over the assignee of the fund where the assignment is prior to the service of the garnishment. *Walling v. Miller*, 166
2. *Claim for trespass assignable*.—A claim for damages in trespass, quarrying and taking away asphaltum, is assignable, and the assignee may sue in his own name under section 4 of the Practice Act. *More v. Massini*, 455

BILLS AND NOTES.

1. *Defense to note*.—Hearsay representations, *held*, no defense to purchase money note. *Davidson v. Jordan*, 54
 2. *Donee of note*.—A donee takes a note subject to equitable defenses. *Hicks v. Jennings*, 138
- See GOLD DUST, 6; MERGER, 1.

BOND.

1. *Want of certainty cured by verdict*.—Defects for want of certainty in pleading are cured by the statute of jeofails, and where, to a declaration on a bond, the defendants pleaded *nil debet*, and the verdict is that the defendants owe the sum claimed and damages are assessed for its detention, the finding is in effect that the bond sued is the bond of the defendants, and that its condition has been broken, and judgment will not be arrested though the plea was not the proper one. *Gear v. Shaw*, 643
- See MEASURE OF DAMAGES, 1; INJUNCTION BOND.

BOUNDARIES—See POSSESSION, 4.

BRICK—See INJUNCTION, 3, 116; LEASE, 4.

CLAIM.

1. *Status of possessory claims*.—The appropriation of the public mineral lands and development of the same under the license and acquiescence of the Federal and State governments considered as fixing the status of mining interests in California. *Merced M. Co. v. Fremont*, 313

CONSIDERATION.

1. *The "prospect," the inducement of purchase*.—Mines are bought and sold on the "prospect," not on the warranty. *Tuck v. Downing*, 84

CONTEMPT.

1. *Proceeding in contempt to protect private rights*.—Where the proceeding by attachment for contempt is in substance to secure the rights of the party injured (as in case of defendants continuing to mine while under injunction), the court regards the substance and not the form, and will issue mandamus to compel the court below to inquire into the acts charged. *Merced M. Co. v. Fremont*, 309
 2. *Proceedings in contempt are in their nature criminal*, and the strict rules of construction applicable to criminal proceedings are to govern therein. *Vanzandt v. Argentine M. Co.*, 634
 3. *Proceedings in contempt* are affected by the invalidity of the original orders. *Brennan v. Gaston*, 426
- See INJUNCTION, 120.

CONTINUANCE.

1. *Continuance not the subject of exception.*—The ruling of the court upon a petition supported by affidavit, for a continuance of a cause, upon the ground that a suit was pending in chancery which would essentially determine the rights of the parties, is a matter within the discretion of the court, and is not the subject of exception or revision upon a writ of error. *Gear v. Shaw*, 643

CONTRACT.

1. *Situation of contracting parties.*—The situation of the parties at the time of entering into contract relations may be considered by the court in interpreting their acts. *Creighton v. Vanderlip*, 172

2. *"Well and faithfully perform."*—A contract guaranteeing the faithful performance of a contract is not a mere guaranty of the skill and fidelity of the principal. *Janes v. Scott*, 181

CONVEYANCE.

1. *Deed to associates in corporate name—Rescission.*—Burns contracted for the purchase of a piece of oil land and sold an interest or share in the adventure to plaintiff. Afterward he had a deed executed to "The Middletown Oil Company," no such company having been incorporated. Plaintiff sued to recover the money advanced for his share, on the ground of misrepresentation: *Held*, that the deed to the Middletown Oil Company passed no title for want of a proper grantee, and that therefore no tender of deed of his interest from plaintiff was necessary to perfect a rescission. *Burns v. McCabe*, 1

2. *Deeds of same date construed together.*—The devisees of the senior patent made on the same day two deeds to the same grantees, in one of which the ground covered by the decree was excepted and in the other it was not: *Held*, that the two deeds were to be construed as one transaction and their effect was the same as if the exception had been mentioned in both. *Anderson v. Harvey's Heirs*, 291

See ACKNOWLEDGMENT; DESCRIPTION, 1; EVIDENCE; INCORPOREAL HEREDITAMENTS, 2; PLEADING AND PRACTICE, 7; TENDER, 1.

CORPORATION.

1. *Good faith required between associates.*—Each person engaged in a common enterprise has a right to expect from his associates good faith in all that relates to the common interest, and if a party pretending to be a purchaser in common with others, be in reality the seller, he must account for the difference between what the property cost him and the price he received for it. *Getty v. Devin*, 29

2. *Railroad directors and the coal supply of the road.*—The contract between the U. P. railroad and Wardell et al., giving them the exclusive right to mine the coal on the company lands and the exclusive supply of coal to the railroad lines, which contract had been assigned to a company controlled by the directors of the railroad company: *Held*, fraudulent and void. *Wardell U. P. R. R. Co.*, 144

3. *Attempt to restrain increase of shares through foreign legislature.*—A company incorporated in California was doing business there, but most of its shareholders were resident in England. At a meeting of the

CORPORATION. *Continued.*

English shareholders a resolution passed authorizing the trustees to take steps for increasing the preference shares to an extent not allowed by the existing charter. It appeared there was no intention to create preference shares except upon action of the California legislature: *Held*, that an injunction ought not to be granted to restrain the company from acting on the resolution, for that the court will not in general restrain parties from applying to the legislature, whether of this or of a foreign country. *Bill v. Sierra Nevada M. Co.*, 413

4. *Misuse of company funds.*—Charging the superintendent with depositing the company funds with a mercantile house instead of in a bank, and with refusal to pay claims against the company, can not be considered breaches of duty when unaccompanied by special allegations showing it to be his duty to do otherwise. *Sherman v. Clark*, 483

5. *Trespass not excused by plaintiff's incapacity.*—One who has trespassed upon water rights acquired by a mining company will not be allowed to defend on the ground that the mining company had no legal capacity to acquire water rights. As between the party despoiled and the wrongdoer the courts will not enter upon this inquiry. *Cole Co. v. Virginia Co.*, 503

See AGENT, 4; FRAUD, 33, 34; JURISDICTION, 4, 5; PERSONAL LIABILITY; PROSPECTUS.

COSTS.

1. *Costs do not follow the decree*, the successful parties being blamable. *Irwin v. Davidson*, 237

COVENANT—See LEASE.

CUSTOM.

1. *Custom in violation of statute.*—Constructive possession of public lands in Nevada can only be had by compliance with the Possessory Act of that State, and no custom of holding lands in direct violation of the statute will be recognized. *Rivers v. Burbank*, 584

DESCRIPTION.

1. *Identity of mines shown by parol.*—Where there is a grant of mines under farms, the identity of the mines is a question of fact, and may be decided by evidence *dehors* the deed. *Field v. Beaumont*, 257

DISTRICT RULES.

1. *The reserving clauses in the act* as to "regulations" to be prescribed, and "local customs" explained and restricted. *Robertson v. Smith*, 196
See CUSTOM.

DITCH—See INJUNCTION, 113, 114.

DRAINAGE—See EASEMENT, 2.

EASEMENT.

1. *How acquired.*—An easement in land can only be acquired by the consent or acquiescence of the owner. *Thorn v. Sweeney*, 564

2. *Easement to drain lands may not be abused.*—"The owner of upper lands who has for more than five years enjoyed the undisputed privilege of running the waste waters used from artificial sources for the purpose of

EASEMENT. *Continued.*

irrigating his land," does not thereby acquire an easement by prescription to run the same over the lower lands in such unreasonable manner as to damage a drain ditch constructed on the lands below. *Blaisdel v. Stephens*, 599

EJECTMENT.

1. *Ejectment maintainable on receiver's receipt.*—In actions between individuals the receipt of the receiver of a land office is, under the statute, sufficient legal evidence of title, though as between the holder of it and the government, the legal title still remains in the United States. *Bracken v. Preston*, 268

2. *A party in possession* ought not to be compelled to bring ejectment. *Munson v. Tryon*, 469

See INJUNCTION, 2, 7, 26, 49, 81, 89, 90; PLEADING AND PRACTICE, 11.

EMINENT DOMAIN.

1. *Taking property without compensation enjoined.*—Private property can not be taken for public use for the construction of a highway, in a Territory in which there are no statutes providing for the payment of a just compensation for the property taken, and an attempt so to do will be restrained by injunction. *Robertson v. Smith*, 196

2. *Condemning land for bringing water to towns.*—It is within the power of the legislature to pass an act for the condemnation of land for the purpose of bringing water into cities and towns. Such a taking would be for a *public use* within the meaning of that term as used in the constitution. *Thorn v. Sweeney*, 564

EQUITY.

1. *Equity will not try title.*—A court of equity will not try the legal rights of parties to real estate. *Irwin v. Davidson*, 237

See PLEADING AND PRACTICE, 5; VERDICT, 1, 2.

ESTOPPEL.

1. *Rescission effects an estoppel.*—Plaintiff's only interest in the land could be by virtue of his membership of the company. If his membership in the company was repudiated by a rescission of the contract he would be estopped to claim as a member of the company. *Burns v. McCabe*, 1

EVIDENCE.

1. *Collateral recitals in deed as evidence in partition.*—The deed from Clement to Alfred recited that Clement held the said land in common with Edward. In an action of partition by the heirs of Edward against Alfred, held, that the deed was *prima facie* evidence for plaintiff of the title of Edward's heirs. *Grubb v. Grubb*, 226

See ADMISSIONS; AGENT, 2.

EXCEPTION—See RESERVATION.

EXPERT.

1. *Weight of evidence.*—The evidence of persons not familiar with mines contrasted with that of experienced miners. *Tuck v. Downing*, 84

FLOODING—See INJUNCTION, 114, 117.

FORFEITURE.

1. *Forfeiture not enforced in equity.*—If a grantee has violated his tenure or his covenants. *e. g.*, if he has undertaken to divide into severalty that which he could only hold as an entirety, he has lost all; but even then a chancellor would send the grantors to law to enforce the forfeiture. But there being no violation, either of tenure or covenants, there is, therefore, no forfeiture to enforce either at law or in equity. *Funk v. Haldeman*, 203

FRAUD.

1. *Fraud of agent against stranger of no avail to principal.*—Where a contract is valid in its inception, subsequent fraudulent conduct of one of the contracting parties toward a stranger, involving the same subject-matter, does not avoid the contract, especially when the stranger is not seeking relief. *Hardy v. Stonebraker*, 10

2. *Facts of the case—Agent to consummate fraud, allowed his hire.*—A agreed with B to let him have \$3,000 if he, B, would procure a purchaser of A's lead land at \$8,000. He procured a purchaser at this price by fraudulently concealing the fact that he was A's agent, and fraudulently advising the purchaser, as a friend, that the land was worth \$8,000 and could not be bought for less, which was not the truth. But the purchaser sought no relief. *Held*, that the original contract, although the commission was large, was not void, and that B could make no use of the fraud of his agent in procuring a purchaser, as a defense to his agreement, to pay the \$3,000 commission. *Id.*

3. *No rescission between vendor and vendee, both concealing their opinions of the real value.*—The vendor, a dealer and speculator in iron mines, had discovered iron ore upon certain lands and had procured title to them on this account. The vendees, scientific men, had been upon the lands and discovered that this same ore was of peculiar quality and was of great value. Negotiations were opened for purchase. Vendees pretended that they wished the lands on account of the timber on them. Vendor represented that it was also valuable for iron, and sold it at a price much more than it was worth for timber—much less than it was worth for iron. *Held*, that vendor had no case to set aside the sale. *Williams v. Spurr*, 17

4. *Sale by subscription headed by decoy subscribers.*—Certain owners of oil interests prepared a subscription agreement, by which each subscriber was to pay the amount set opposite his name, toward the purchase of the property, which was to go to a corporation to be organized. Each owner subscribed \$5,000, and caused others to sign these subscriptions which were marked paid, but were not in fact intended to be and never were paid. Plaintiffs, with others, believing these subscriptions *bona fide*, subscribed and paid their money to one of the owners, who divided it with his co-owners. The corporation was organized and stock issued. *Held*, that the subscription paper was a fraud upon all the signers who had paid upon it, and that the associates in the scheme (the original owners) were at least liable to account to the *bona fide* subscribers for their profits on the sale to the corporation. *Getty v. Derlin*, 29

5. *Misrepresentations by corporate agent do not bind or affect th*

FRAUD. *Continued.*

officers of the corporation in their individual capacity, so as to impose liability upon them in an action where they are sued personally. *Arthur v. Griswold*, 46

6. *False representations must be inducing cause.*—False representations, such as make corporate officers personally liable to a person advancing money on them, must not only be false to the knowledge of the parties making them, but must be the inducing cause to the person parting with his property. *Id.*

7. *Hearsay representations of value.*—Representations of the value of a mine made by vendor upon hearsay, and known by vendee to be hearsay, can not be said to be false or fraudulent, unless the vendor knew or had reason to believe them to be untrue. *Davidson v. Jordan*, 54

8. *Fraud of agent unknown to principal.*—If an agent effect a sale by false representations or other fraud, which false representations or fraud are unknown to his principal, the legal status of the latter is just the same as if the false representations or fraud had been made or done by himself. *Law v. Grant*, 56

9. *False representations made by stranger.*—A vendor making a sale induced by the false representations of a third party to the knowledge of the vendor, is responsible for the fraud, although the party making the false representations was not his agent; but where the sale is made without the vendor's knowledge of the fraudulent representations having been made, the consequences can not be charged to the vendor, and the sale will stand. *Id.*

10. *Idem.*—The fact that false representations made by a stranger induced the sale, the stranger having no motive in the transaction, unless he was to be paid out of the proceeds, might induce a presumption of agency; but such presumption can not be indulged if the conduct of such stranger can be accounted for on an hypothesis consistent with the vendor's innocence. *Id.*

11. *Facts of the case—Purchase advised by spiritual medium and witch-hazel wizard.*—Plaintiff sold defendant land for \$40,000, of which \$25,000 was secured by mortgage. The tract was worth about one third the purchase money. Defendant had been induced to purchase upon extravagant assurances of the existence of mineral, although after much expenditure no mineral at all was found to exist on the land. These representations were made by a party who professed to be able to detect the presence of mineral by the "impressions produced by passing over the place," and a spiritual medium had advised the purchase. The vendor, from the evidence, appeared to have known of the influences at work upon the purchaser, and to have taken advantage of them to ask an extravagant price for the land, but aside from this no fraud was brought home to the plaintiff. In suit to foreclose the mortgage it was held, that these facts did not constitute a defense. *Id.*

12. *Sole inducement.*—The false statements relied on to sustain the action need not have been the sole inducement to the purchase. *Morgan v. Skiddy*, 74

13. *Lode extension.*—The prospectus represented the Bates lode as

FRAUD. Continued.

parcel of the property of the company, when in fact the company only held a piece of property located as an extension of the Bates lode. *Held*, a material misrepresentation. *Id.*

14. *Fluctuations of mining property*, considered with reference to disproportion between original price of the mines and the subsequent valuation for stocking purposes. *Id.*

15. *Use of name of trustee*.—The mere allowance of the use of a party's name as trustee of a company whose stock afterward proves to be worth less, is not sufficient to maintain an action charging personal liability without proof of knowledge of such fact or of any false representations. *Id.*

16. *Misrepresentations immaterial or not relied on*.—To justify a court of equity in rescinding a sale, it is not only necessary to establish the fact of misrepresentations by clear proof, but they must be upon a material matter; if upon an immaterial thing, or if the other party did not trust to it, or upon a matter of opinion or fact equally open to the inquiries of both parties, in regard to which neither could be presumed to trust the other, there is no reason for equity to grant relief on the ground of fraud. *Tuck v. Downing*, 83

17. *Latitude allowed vendor*.—A vendor trying to sell his own property has a right to "puff" it in the most extravagant terms, the other party being at full liberty to exercise his own judgment about it. *Id.*

18. *Misrepresentation as to price paid*.—The vendor of a mine represented that he had paid, or was under obligations to pay, \$40,000 for it. At the same time he exhibited a deed to himself, expressing a consideration of but \$9,000. *Held*, 1. That a false statement of the price paid is not of itself a material representation. 2. That in connection with the exhibition of the deed it could not have misled. *Id.*

19. *Purchase after inspection*.—On a bill to set aside a purchase of an interest in a mine in Utah, sold in Pennsylvania, on the ground of fraudulent misrepresentations as to the quality and prospects of the mine, it appeared that on the representation of the vendor a committee had been selected, who had personally examined the mine, on the report of which committee the sale was consummated: *Held*, that any extravagant representations of the vendor could only be regarded as the expression of an opinion about a matter of which the committee could judge for themselves, and that they formed no ground for setting aside the contract. *Id.*

20. *Matters of opinion*.—Where the representations complained of are necessarily mere matters of opinion as to the future prospects of a mine, the rule, *caveat emptor*, applies, and the sale will not be set aside whether the vendee has or has not availed himself of an opportunity to examine the premises. *Id.*

21. *"Jumped" claim—General allegations of fraud, in pleadings, not sufficient*.—Plaintiff's petition stated that the defendant had falsely and fraudulently represented that he, the defendant, had "jumped" a certain claim in Deadwood, "whereby he was at that time the lawful owner thereof, according to the mining laws of said district, all of which

FRAUD. *Continued.*

statements," etc., were false and fraudulent; and upon such false representations had sold his interest in the claim to the defendant: *Held*, that while a contract procured by fraud may be rescinded at the election of the injured party, a general allegation of fraud is not sufficient; the particular circumstances which constitute the fraud must be stated; the allegation that defendant was not at any time the "lawful" owner, according to the mining laws of said mining district, is not such a statement of facts as would authorize a rescission. *Arnold v. Baker*, 111

22. *False pretense of irrigating facilities—Appurtenances—Constructive admissions in pleading.*—Defendant had sold to plaintiff a ranch. Plaintiff brought action for damages, alleging that defendant had represented that all the waters of Thomas creek "belonged to him to use and appropriate as his own." Defendant denied making the representations, and further averred that the deed executed to consummate the sale did not convey any water rights, either in the description or under the word "appurtenances." *Held*, that this latter defense was an admission by the defendant that the waters of Thomas creek were not appurtenant to the ranch, and precluded him from showing that plaintiff had lost the use of the water through the trespasses of other parties in diverting it. *Banta v. Savage*, 113

23. *Materiality—Opinions—Facts.*—False representations do not amount to fraud unless they are made as to material facts, nor do opinions expressed make a party liable; whether statements were intended as matters of opinion or as averments of facts is for the jury. *Id.*

24. *Conversations and conduct.*—The defendant had taken plaintiff over the land, crossed the streams in controversy and the ditch, impressing the fact that the irrigation facilities were complete: *Held*, that the conduct, as well as the conversations, was to be considered by the jury in determining the question of fraud. *Id.*

25. *Caveat emptor not applied to active fraud.*—A vendor may be silent and be safe; but he may not by acts or words lead the buyer astray. *Id.*

26. *Sellers pretending to be buyers.*—Owners of land who procure a sale by falsely pretending that they are joint purchasers with others, all subscribers to a common scheme, are liable in equity to account to the real purchasers for the profits realized by the sale over and above the original cost. *Getly v. Devlin*, 119

27. *Decoy subscription—Parties to bill for accounting.*—Where such sale was effected by the owners joining with others as common subscribers, the owners marking their own subscriptions and certain decoy subscriptions as paid, while in fact the only money really paid was by the subscribers who were ignorant of the facts, it was *held*, that all the subscribers were proper parties to the suit for an accounting; and that the action in the name of two of the *bona fide* subscribers in their own right and as assignees of other *bona fide* subscribers against the owners of the property and all the other subscribers, both *bona fide* and fictitious, as defendants, should be sustained; but that if the claim were to recover the gross amount paid by the subscribers there would be a misjoinder. *Id.*

FRAUD. *Continued.*

28. *Associates in fraud liable for each other's receipts.*—One of the owners having received all the subscription money and divided it among his associates, it was *held*, that his legal representatives were liable, not only for the proportionate share retained by him, but for that distributed among his associates. *Id.*

29. *Agent dealing on two contracts—one on which to sell, the other on which to settle—Duress.*—An agent for the purchase of a mine took from the owners two title bonds. One represented the terms of sale as \$1,500 cash, and \$4,000 to come out of the proceeds of working. The other called for \$4,000 cash, and \$4,000 out of the proceeds. The sale was consummated between the agent and the seller on the first bond, but the agent had procured from his principal the \$4,000 cash, representing the sale to be on the latter, and concealing the existence of the former bond. Upon discovery of the fraud he gave a secured note to his principal for an agreed balance. In the settlement the principal told him he was liable to prosecution for fraud: *Held*, that the original transaction was a fraud upon the principal: 2, that there was no duress in the settlement, and, 3, that it was not a case where the court would inquire whether the precise sum mentioned in the note was the sum due. *Jackson v. Allen*, 127

30. *Cancellation of fraudulent corporate lease.*—Where the directors of a mining corporation made a lease of the mines of the company to a nominal party acting in the interest of a minority of the stockholders, for the purpose of securing control of the property, and to take it out of the reach of the new board about to be elected: *Held*, upon bill filed by the corporation, that the lease should be canceled. *Mahony M. Co. v. Bennett*, 133

31. *Defense of fraud where land was sold in parcels.*—Several tracts of mining land were sold under one contract, but separate deeds naming distinct considerations were given for each tract: *Held*, that fraud and want of consideration in the sale of one tract could be set up as a defense in a suit to foreclose a purchase money mortgage upon another of such tracts. *Hicks v. Jennings*, 138

32. *Defense runs against heirs.*—And that such defense could be set up against the heirs and distributees of the mortgagor where such mortgage had been transferred to them as an advancement. *Id.*

33. *Private interest of directors subservient to official duty.*—The directors of a corporation are subject to the obligations which the law imposes upon trustees and agents. They can not, therefore, with respect to the same matters, act for themselves and for it, nor occupy a position in conflict with its interests. *Wardell v. U. P. R. R. Co.*, 144

34. *Credit mobilier contract not enforced.*—Applying this rule, a court will refuse to give effect to arrangements by directors of a railroad company to secure, at its expense, undue advantages to themselves, by forming, as an auxiliary to it, a new company, with the understanding that they or some of them shall become stockholders in it, and then that valuable contracts shall be given to it by the railroad company, in the profits of which they, as such stockholders, shall share. *Id.*

See CORPORATIONS, 1, 2, 4; GOLD DUST, 3, 4; INJUNCTIONS, 111; PERSONAL LIABILITY, 2; PROSPECTUS; RESCISSION.

GIFT—See BILLS AND NOTES, 2.

GOLD DUST.

1. *Gold dust left with innkeeper.*—An innkeeper, like a common carrier, is an insurer of the goods of his guest, and is accountable in case of either theft or robbery—but he is so liable only when the goods are deposited with him by travelers in the character of guests of the inn. *Maleer v. Brown*, 156

2. *Garnishment of bailee of amalgam for coining.*—Defendants, expressmen, received a lot of amalgam to take to the mint and have converted into coin. It belonged to five owners, one of whom, Carpenter, assigned his interest to the plaintiff. Defendants, after the assignment, but before they had notice thereof, were garnished on behalf of a creditor of Carpenter, on which garnishment they paid his share of the money. Before payment they had notice of the assignment: *Held*, that the assignment was valid; that Carpenter had no exclusive interest in any part of the coin until it was converted into coin and divided; that his right was a chose in action, which he could by an order assign, and that the Statute of Frauds, requiring delivery of possession, had no application to such a case. *Walling v. Miller*, 165

3. *Surreptitious carriage of gold dust.*—If a passenger surreptitiously introduce into a coach an article of great value (gold dust) with the view of getting it carried for nothing when the carrier is accustomed to charge for such service, he is guilty of a gross fraud, and in case of loss can not recover. *Hellman v. Holladay*, 168

4. *Contract, after fraud known.*—But if, notwithstanding the passenger's intention to defraud him, the carrier, after learning of the fact, charges and the passenger pays for carrying the article as extra baggage all the charges usual therefor, then the carrier is liable for the value of the article, if lost. *Id.*

5. *Proof of freight paid.*—It is for the jury to determine whether the carrier received the compensation knowing the baggage to contain gold: and if he did he is liable for it without regard to the rates charged. *Id.*

6. *Contract subsequent to note.*—An agreement reducing the rate of interest on a note payable in gold dust, extending time of payment and setting apart property to secure such payment: *Held*, no merger of the original contract to pay the gold dust. *Creighton v. Vanderlip*, 172

GUARANTY.

1. *Precious suit against principal.*—Defendant guaranteed that Burke should fulfill a contract for sinking an oil well. Burke did not fulfill the contract. It was not necessary to liquidate the damage against Burke before proceeding on the guaranty. *Janes v. Scott*, 181

2. *Insolvency of principal.*—Where the principal is insolvent at the maturity of the debt, neither judgment and execution, nor demand upon him, nor notice of non-payment to the guarantor, are necessary before suing the latter. *Id.*

GUARDIAN AND WARD.

1. *Fair mining securities allowed.*—Credit allowed for an investment by a guardian in a loan of a corporation owning coal lands and a canal,

GUARDIAN AND WARD. *Continued.*

and chartered to carry on the business of mining, shipping and carrying coal—the company being considered at the time to be safe and the practice of investing therein common; though in three years and ten months thereafter they were obliged to suspend payment of interest by reason of inundations which destroyed their canal. *Ogle's Estate, in re,* 189

HIGHWAYS.

1. *If fee vested in the authorities, they hold the minerals.*—Where the fee simple in the town streets, and not a mere easement for purposes of the public, is vested in the trustees of a town, they are the owners of the coal underneath such streets. *Hawesville v. Hawes,* 193

2. *Legislature may vest the fee of streets.*—It is competent for the legislature, with the assent or procurement of the owner of the soil, to vest the absolute title to the ground covered by the streets in the trustees of the town, and the act incorporating the town of Hawesville had this effect. *Id.*

3. *Right of way over mining claims—Act of Congress construed.*—The defendants, as county commissioners and road supervisors, undertook to lay out a highway across the mining claims of the plaintiffs under the act of Congress of July 26, 1866, which provides "That the right of way for the construction of highways over public lands not reserved for public uses is hereby granted." The same act grants the right to explore and occupy the public mineral lands subject to local rules, etc. *Held,* that the plaintiffs, being in possession, are presumed to hold in accordance with such local rules; that their rights having become vested by virtue of the grant contained in said act of Congress, their mining claims are no longer to the full extent public lands; and that neither the defendants, the Territory nor the general government could devote this ground to the use of a highway without giving the plaintiffs a just compensation for all the damage done their rights. *Robertson v. Smith,* 196

4. *Prior in time, prior in right, applied to highways.*—One who locates a mining claim on the public domain does not do so subject to the right of the public to construct a highway over the same. The proper construction is that miners have a right to occupy the public mineral lands, and the public have a right to an easement for a highway over the public domain, and whichever is prior in time is prior in right. *Id.*

5. *Right of way—Stone.*—A gift of the right of way (the right to open a public street) is not a gift of the rock and other materials within the boundaries of the way. *Smith v. City of Rome,* 306

INCORPOREAL HEREDITAMENTS.

1. *Construction of complicated oil land contract—License made exclusive and irrevocable by the contract of the parties.*—McElheny, being the owner of a farm composed of land in Cherry Tree and Cornplanter townships, in consideration of \$200, granted to Funk, his heirs and assigns, the free and uninterrupted privilege to go upon a tract of said land in Cornplanter township for prospecting, boring, etc., and taking any oil, salt, coal etc., out of the earth; Funk to have the exclusive use of one acre of land around each pit or well, with free ingress on said land in common with McElheny; Funk diligently to search for oil, etc., and give McElheny

INCORPOREAL HEREDITAMENTS. *Continued.*

one third of all taken out, McElheny reserving the right of tillage. McElheny afterward conveyed to Haldeman all his farm subject to the agreement with Funk. Haldeman afterward agreed with Funk that his rights should include all lands in Cornplanter township (reserving a strip of ground), giving to Funk the right to transfer in whole or in part to others, and afterward granted to Funk the same rights in the Cherry Tree tract which he had in the Cornplanter.

Held, 1. The conveyance gave Funk an incorporeal hereditament in fee, which would have been indivisible at law, but was made divisible by the grants, and this interest which would also at law have been held in common with his grantors was made exclusive in Funk by the terms of the grants.

2. The grantors have no mining privileges, and can have none until Funk shall forfeit his rights by breach of covenant.

3. The grants to Funk did not amount to a lease, nor a sale of the land or the mineral; no estate in the soil or minerals was granted. The right granted to Funk was to prospect for oil, extract and take it, rendering one third to the landlord.

4. Funk's right was a license to work the land for minerals, coupled with an interest revocable only for breach of covenant.

5. The \$200 paid was the consideration for the right of entry or privilege to bore for oil; the royalty was the consideration for the oil when found. *Funk v. Haldeman*, 203

2. *Grant of iron ore limited to a certain furnace, construed to create an incorporeal hereditament.*—Clement and Edward Grubb owned in common "The Mount Hope Estate," which consisted of several tracts of land, and one sixth of "three certain mine hills, known as Cornwall ore banks." Clement conveyed to Alfred his half of "The Mount Hope Estate," designating the particular tracts, together with the right, "so far as the said Alfred's right under this conveyance in said Mount Hope furnace is concerned, of the said Clement to raise, for the use of said furnace, iron ore out of three certain mine hills, etc., known as the Cornwall ore banks, etc., but for so long and such time only as said furnace can be carried on, etc., by charcoal." *Held*, that this conveyance granted to Alfred a limited privilege to take ore, and did not convey the corporeal estate in the mine hills; that remained in Clement. *Grubb v. Grubb*, 226

INFANT.

1. *Majority of female infant.*—A female infant, by statute of Colorado, attains her majority at eighteen, and at that age she may execute a promissory note. *Jackson v. Allen*, 127

INJUNCTION.

1. *Exceptional nature of mines, timber, etc.*—The general rule is that a court of equity takes no jurisdiction in cases of mere trespass, not even by granting a temporary injunction. But there is an established exception in the cases of mines, timber, and the like, in which cases injunctions will be granted to restrain the continued commission of acts by which the substance of the estate is destroyed or carried off. *Irwin v. Davidson*, 237

INJUNCTION. *Continued.*

2. *Plaintiff must support bill by ejectment.*—The plaintiff seeking an injunction as the legal owner of property must show that he has established his legal title by the judgment of a court of law, or that he is prosecuting his suit at law, and that the injury which he will sustain by the acts of the defendant before he can obtain judgment will be irreparable; and, in the latter case, the court in con inuing the injunction must make such order as will insure a speedy determination of the suit at law. *Id.*

3. *Lessee enjoined from converting the soil into brick.*—Lessee for years, though without impeachment of waste, may not destroy the land to the injury of the reversioner. Injunction issued to prevent the taking of the clay for brick. *Bishop of London v. Web,* 247

4. *Parties.*—Tenant for life having made a lease of coal mines, amounting to a forfeiture, can not join the remainderman in a bill for an injunction. *Wentworth v. Turner,* 249

5. *Trespass enjoined as well as waste.*—Injunction where the defendant, having begun to take coal from his own land, had worked into that of plaintiff. *Mitchell v. Dors,* 250

6. *Injunction against opening a mine* may be granted when the working of a mine already opened would not be restrained. *Grey v. Duke of Northumberland,* 250

7. *No injunction without speedy trial at law.*—Where the title is unsettled, an injunction will not be continued where no means of insuring a speedy trial can be assured. *Grey v. Duke of Northumberland,* 251

8. *Removing stones from sea-bottom enjoined.*—Upon a bill, praying for an account and for an injunction to restrain a trespass in the nature of waste, brought by the lord of the manor and his lessees against the defendant for taking stones, having a peculiar value, from the bottom of the sea, within the limits of the manor, the Lord Chancellor granted the injunction until answer or further order. *Cooper v. Baker,* 253

9. *Jurisdiction—Waste and trespass.*—The jurisdiction of chancery to restrain by injunction and to compel an account, in cases of the destruction or taking away of the substance of the estate, is no longer restricted to waste, but is extended to trespass. *Thomas v. Oakley,* 254

10. *Abuse of privilege.*—Injunction issued to restrain the unlimited taking of stone by defendant, who had a restricted right to take stone for certain uses in connection with certain lands. *Id.*

11. *Quarries.*—If chancery will restrain by injunction, trespass committed in mining ore or coal, it will give the same relief against quarrying stone. No distinction on the question of comparative value can be made. *Id.*

12. *Injunction prevented by laches*—To stop the working of a coal mine is a serious injury, and when it has been allowed to be worked for eight years, the expenditure is an equitable ground to prevent the hasty interference of the court. *Field v. Beaumont,* 257

13. *Injunction sought by party refusing to produce documents.*—Whether, after a verdict at law in trespass, the court would grant an injunction in favor of parties who, at the trial, had refused to produce documents essential to a just decision, doubted. *Id.*

INJUNCTION. *Continued.*

14. *Waste on mortgaged mine.*—Capner sold his farm to a mining company by articles in which the payment of certain installments of purchase money was secured by a clause to the effect that he should have all the remedies of a mortgagee. In other clauses the fact of the sale being for mining purposes appeared. The vendor sued to foreclose, and prayed for an injunction to stay waste, and on appeal it was *held*, that the injunction should have been refused so far as it affected the cutting of necessary timber and the digging of shafts, etc., for mining purposes, such acts not being waste, but was proper to prevent the removal of buildings and fences, etc., done to injure and harass the complainant. *Capner v. Flemington M. Co.*, 263

15. *Notice of application—Discretion.*—The operations of large mining companies should not be arrested by injunction without notice, except in very plain cases, or where there is a pressing necessity for immediate action. There is a discretion which the court must exercise in every case. *Id.*

16. *Equity jurisdiction to restrain trespass.*—An injunction will be granted to restrain a trespass in order to quiet the possession, or when there is danger of irreparable mischief, or where the value of the inheritance is put in jeopardy by a continuance of the mischief, but in ordinary trespasses, or where the remedy at law is adequate, equity refuses to interfere. *Bracken v. Preston*, 267

17. *Trespass in digging or mining on the land of another* is within the cognizance of a court of equity when committed by a mere wrongdoer, or where a party exceeds a limited authority. *Id.*

18. *Surrender of possession not decreed.*—To justify the interference of equity, the complainant must in general be in possession or have established his right at law, or brought an action to recover possession, or his exclusive right must be admitted by defendant; but the court will, in all such cases, proceed with great caution, and although a defendant does not show a legal right to possession, yet as a court of equity has no direct jurisdiction to try title, except in certain peculiar cases, it will not decree that the defendant surrender possession. *Id.*

19. *Disseized plaintiff.*—No injunction will be allowed in cases of trespass with an account, where the complainants, being disseized, can not maintain an action for mesne profits. *Id.*

20. *Requisites of bill—Insufficient case for interlocutory writ.*—Where a bill was brought alleging a continuing trespass by mining copper ore, showing that complainants had been disseized, and praying an injunction pending an action for forcible entry and detainer, and for an account of mineral exsacted, and for decree that defendants surrender possession and the complainants be quieted in their title, and it appeared that the defendants were in possession under claim of right: *Held*, that the bill did not state a case entitling them to relief; that ejectment was the proper remedy with a preliminary injunction on a proper bill showing the pendency of such action to try title, and that after recovery therein the plaintiffs could obtain satisfaction by an action for mesne profits. *Id.*

21. *Notice to dissolve.*—Service of the rule *nisi* upon complainant's

INJUNCTION. *Continued.*

solicitor, stating the grounds of the application and fixing the time and place of hearing the motion to dissolve an injunction in vacation, on the coming in of the answer, is sufficient service. *Moore v. Ferrell*, 281

22. *What answer will compel dissolution.*—Where the answer plainly and distinctly denies the facts and circumstances upon which the equity of the bill is based the injunction will be dissolved; but where the trespass itself is not denied and the defense is in the nature of confession and avoidance there is not a denial of the equities. *Id.*

23. *Irreparable nature of injury.*—The irreparable character of the injury is a necessary legal inference from the facts admitted—that defendants are taking the gold. *Id.*

24. *Title and insolvency denied.*—Trespass will be enjoined in all cases where from the nature of the trespass or the circumstances of the parties the remedy at law is not adequate, but equity will not intermeddle with the title; where title is denied courts will look more closely to the character of the trespass. It will not dissolve an injunction against gold mining upon an answer denying only the title and the allegation of insolvency. *Id.*

25. *Distinction between mining, and other injunction cases.*—Injunctions to prevent persons from working a gold mine to which the plaintiff claims title, are not put upon the same footing with injunctions to stay execution on judgments at law, where the legal rights of the parties have been adjudicated. In the former class of cases, where it appears that if the defendants' allegations be true the injunction can do them no harm, but if plaintiff's allegations be true, he may sustain an irreparable injury—the injunction should be continued to the hearing, that the facts may be investigated. *McBrayer v. Hardin*, 288

26. *Injunction without ejectment.*—Injunction against a trespasser to prevent his taking ore ought to issue in favor of a party in possession under a clear title without requiring him to bring an action at law. *Anderson v. Harvey's Heirs*, 291

27. *Taking ore, a destructive trespass.*—The taking of iron ore from land of little or no value except for such iron ore, is a trespass going to the destruction of the estate. *Id.*

28. *Ascertainment of damages.*—The fact that the value of the ore taken could be readily ascertained does not deprive a court of equity of its right to interfere by injunction. *Id.*

29. *Lessees protected against trespassers—Writ expires with lease.*—A party claiming the right to work lead mines as a lessee may be protected against a trespasser by injunction, but after the lease has been terminated by a sale of the premises the lessees have no longer any rights to protect, and although the lease contains a general covenant for renewal, the bill for injunction should be dismissed. *Boyle v. Laird*, 301

30. *Trespass—Irreparable injury.*—An injunction will not be granted in aid of an action of trespass, unless it appear that the injury will be irreparable, and can not be compensated in damages. *Waldron v. Marsh*, 305

31. *Sufficiency of affidavit alleging irreparable injury.*—It is not suffi-

INJUNCTION. *Continued.*

cient that the affidavit should allege that the injury will be irreparable; it must be shown to the court how and why it would be so; otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's right. *Id.*

32. *Waste—Practice.*—It has become almost a matter of course to grant an injunction to stay waste. *Smith v. City of Rome*, 306

33. *Appeal no supersedes to injunction.*—Where an injunction has been granted and an appeal is taken by the defendants from the order allowing the injunction, the injunction is not dissolved nor superseded by the appeal. *Merced M. Co. v. Fremont*, 309

34. *Mandamus to compel enforcement of injunction.*—Mandamus will lie to the judge of the court below from whose court an injunction has issued to compel his issuing attachment to enforce the injunction pending an appeal thereon. *Id.*

35. *Trespass enjoined, as well as waste.*—Courts now restrain destructive trespasses, and the distinction which once confined their interference to cases of technical waste has been discarded. *Merced M. Co. v. Fremont*, 313

36. *Special case of gold mines.*—The principle upon which destructive trespass is restrained applies to gold mines as well as others. If a party remove, he removes all that is of any value in the estate itself. It is emphatically taking away the entire substance of the estate; another material circumstance is the absence of any mode of fixing the amount of damage to the mine. *Id.*

37. *Irreparable injury.*—Taking away the minerals is in itself an irreparable injury; and the mere statement of this fact is a compliance with the ruling that the complaint must state *how* the injury is irreparable. *Id.*

38. *Insolvency* is not necessary to be alleged where the right depends upon the nature of the injury. *Id.*

39. *Due discretion* should be used in the granting of injunctions to restrain alleged irreparable mischiefs. When title is in dispute the court should be more cautious; but in all cases it is a matter of sound discretion. *Id.*

40. *Preservation of property pending litigation.*—Where there is reasonable ground to apprehend irreparable mischief pending the litigation, and the title be matter of doubt, the courts should restrain both parties or appoint a receiver. *Id.*

41. *Facts sufficient to justify damages only, without injunction.*—The complaint stated that the defendants had constructed a mining ditch above that of plaintiffs, and had thereby diverted the waters of the stream which supplied them without any allegation of continuing injury, and claimed damages and a perpetual injunction: *Held*, that the case stated was sufficient to support an action for damages, but not to sustain the injunction. *Coker v. Simpson*, 320

42. *There must be equitable circumstances stated*, to obtain a remedy by injunction. *Id.*

43. *Injunction pending trial of plea to jurisdiction.*—The plea to the

INJUNCTION. *Continued.*

jurisdiction does not oust the jurisdiction of the court; in a case of threatened irreparable mischief the court will issue an injunction to stay the mischief pending the argument or issue, and accelerate the hearing or argument upon the issue made. *Fremont v. Merced M. Co.*, 332

44. *Affirmations in avoidance.*—On motion to dissolve, the court will consider matters set up in the bill by way of avoidance as if stated by affidavit. *U. S. v. Parrott*, 336

45. *Title to mine disputed.*—An injunction may issue to stay the working of a mine although the legal title is in controversy, the object being to preserve the subject-matter of the litigation. *Id.*

46. *Denying the equities of the bill.*—Where the answer denies directly and positively, upon personal knowledge, the allegations of the bill, it is a denial of the equity, and acting upon such answer as evidence an injunction ought to be dissolved in the absence of extraordinary circumstances, such as waste, destruction, trespasses, etc.; but where fraud, forgery and antedating are distinctly charged in the bill, the denial of such charges upon information and belief is not a denial of the equity of the bill, and can not defeat the motion for injunction or cause the dissolution of one already granted. *Id.*

47. *Trespass on mine—Irreparable injury.*—Working a mine belongs to the class of irreparable injuries; taking away the minerals is taking away the substance of the estate. *Id.*

48. *Insolvency.*—The allegation of insolvency is not necessary to procure the injunction in these cases; it is an element to be considered in connection with the amounts involved, and, where it exists, is a proper subject for allegation in the bill. *Id.*

49. *The institution of a suit at law to try title,* is not indispensable to the jurisdiction in equity to protect the property. *Id.*

50. *Ore already severed.*—The removal of the fruits of past waste may be enjoined. *Id.*

51. *General allegations insufficient if equities denied.*—A party who claims the right to the waters of a ditch, and avers that defendants are diverting the same, and thereby causing irreparable damage, is not entitled to an injunction, if the answer denies the equity of the bill, unless some equitable circumstances beyond the general allegation of irreparable injury be shown, such as a threatened destruction of the property or the like. *Burnett v. Whiteside*, 407

52. *Surety can not rescind, discharging principal.*—Where A, as principal, and B, as surety, gave a note on an executory contract for the purchase of a copper mine, in which contract a fraud was practiced on A, it was held that a bill filed by B alone, praying for an injunction to stay execution on a judgment at law, obtained on the note, the bill setting up no other equity, and failing to pray for any disposition of the original transaction, was defective in substance. *Emmons v. McKesson*, 409

53. *Application to Supreme Court to enjoin pending the appeal.*—Plaintiffs being about to appeal from an order dissolving a preliminary injunction, the judge below made an order that upon the perfecting of

INJUNCTION. *Continued.*

the appeal the order granting the injunction should revive and continue in force. Plaintiffs perfected the appeal and applied to the Supreme Court for an injunction pending the appeal, on the ground that defendants were disregarding the reviving order: *Held*, that the application be denied, because the order reviving the injunction was ample to protect the plaintiffs until the appeal could be heard, or the injunction be dissolved by some competent authority. *Eldridge v. Wright*, 418

4. *A prayer for injunction is addressed to the discretion of the court*, and upon the facts of the case the discretion of the court below having refused to grant the writ, the damage threatened not great and the insolvency of the defendants denied, the action of the court below was approved. *Slade v. Sullivan*, 419

55. *Practice in connection with trespass suit.*—Plaintiffs sued for damages by reason of alleged trespasses upon a certain portion of quartz mining claims, averred in the complaint to be the property and in the possession of the plaintiffs, and alleging, further, the insolvency of defendants, asking an injunction against further trespasses, which was granted. The defendants denied all the allegations of the complaint, and averred ownership. The jury found generally for the defendants, but the court below refused to dissolve the injunction: *Held*, 1. That the action amounted to an action of trespass, with an injunction in aid. 2. That the action having failed, the injunction should go with it. *Brennan v. Gaston*, 424

56. *An ancillary writ should abate with the suit which it supported*, plaintiffs having failed to prove that which would have been necessary to maintain their suit, even where the action need not be considered as deciding the question of title, nor as debarring plaintiff from proceeding anew for original relief. *Id.*

57. *Ex parte order changing possession.*—A judge at chambers has no power by *ex parte* order to induct defendants into possession of mining ground held by complainants, although after general verdict for the defendants. *Brennan v. Gaston*, 426

58. *Destruction of fruit trees—Perpetual injunction after successive verdicts at law.*—Plaintiffs took up land under the Possessory Act of California, inclosed it and planted it with fruit trees. Defendants entered upon the premises, dug a ditch thereon for mining purposes, and washed away and destroyed the trees. Plaintiffs sued for damages, and prayed a perpetual injunction. Verdict, "We, the jury, award the plaintiffs forty-two dollars damages." The court rendered judgment accordingly, but refused to make the injunction perpetual, although the plaintiffs had recovered a similar verdict in a previous suit: *Held*, that the verdict was conclusive of the rights of the parties, and the only remedy from which the plaintiffs could derive adequate relief was by injunction. The injury was irreparable in its nature, and destructive of interests for which no equivalent could be returned. *Daubenspeck v. Grear*, 429

59. *Holder of equitable title, when not entitled to injunction to stay waste.*—A died intestate in possession of a certain tract of land belonging to the United States, which he claimed as mineral land. Afterward, in

INJUNCTION. *Continued.*

1854. B purchased of the United States said tract and others claimed as mineral lands, under an arrangement with the respective claimants that he should take the title in his own name; that each should furnish money to pay for the land claimed by him, and that B should convey to each. B purchased the tract in question with money of A's estate, furnished for that purpose by C, the administrator (who was also one of the heirs), and in 1856 conveyed said tract to C, as administrator. One of the heirs having obtained from six of his co-heirs conveyances of their interests in said land was, upon petition to the county court of the county where the land is situate, adjudged to be the owner of seven elevenths of the land, which undivided seven elevenths were by said decree assigned to him. The last named heir brought suit to recover possession of his interest in the land, and prayed for a temporary injunction to restrain the defendants from digging and committing waste upon the said tract during the pendency of the suit. The injunction was granted, but afterward on motion of defendants was dissolved, and the plaintiff appealed from this order: *Held*, that the legal title was in C, and not in the heirs, and that as it appeared from the complaint that the plaintiff had only an equitable title, and that no final judgment in his favor could be had, he was not entitled to the temporary injunction. *Gillett v. Treganza*, 432

60. *Water supply threatened but not yet affected by continued mining.*—By mining operations the defendant had not only sunk the level of a stream supplying plaintiff's mill, but also the level of the adjoining land. Plaintiff filed a bill for an injunction, but there had been as yet no actual diminution of the water to the mill, though threatened: *Held*, that the bill ought not to be dismissed, but should stand with leave to apply further; the defendant meanwhile to give an undertaking not to diminish the flow. *Elwell v. Crowther*, 438

61. *Injunction after recovery in trespass.*—The complaint averred that defendants unlawfully entered upon certain mining ground owned by plaintiffs, and mined out large quantities of gold, of the value of \$1,000, and that defendants were wanton trespassers, and concluded with a prayer for judgment for \$1,000 and an injunction. The answer averred that defendants were the owners of a certain portion of the ground described in the complaint, and denied that defendants had worked any ground except that to which they claimed title. The cause was tried by a jury who found "a verdict in favor of the plaintiffs, with one dollar damages." The court thereupon rendered a judgment in favor of plaintiffs for one dollar, without costs, and ordered the temporary injunction, which had been granted, to be dissolved: *Held*, that the verdict of the jury decided the question of title in favor of the plaintiffs, and that the refusal of the court to grant a perpetual injunction was error. *McLaughlin v. Kelly*, 445

62. *Injunction which ends controversy not refused.*—In an action of trespass in which the title has been litigated, it is no reason for refusing a perpetual injunction that it would conclusively settle the title to the ground in dispute, and estop defendants from recovering any portion of the ground in another form of action. The principal object of actions is to produce just such a result; that is, to finally settle the controversy. *Id.*

INJUNCTION. *Continued.*

63. *Restraining party claiming title—Laches—Expenditures.*—If a mining company has been in possession of a quartz ledge for several months, expending large sums of money in working it as their own, it will require a strong showing to induce a court of equity to grant or sustain an injunction to stop the work. There must be an urgent necessity, and the title of plaintiffs must be shown to be clear, and not in dispute. *Real Del Monte M. Co. v. Pond M. Co.*, 452

64. *Title in dispute—Inconvenience to defendant, and his solvency.*—Where the title to property is in dispute, the injury occasioned to the parties respectively by the granting or refusing of the injunction will be compared, and the question of defendant's solvency will be considered. *Id.*

65. *Equitable relief and damages in the same action.*—A claim for damages for trespass committed and a prayer for injunction to prevent further waste may be joined in the same complaint. *More v. Massini*, 455

66. *Plaintiff in possession.*—A party may have an injunction to restrain a threatened injury to real property, in the nature of waste, even though he is in possession of the land. *Id.*

67. *Dispute between lessees.*—In a dispute as to their rights between parties working under different leases on the same coal veins, no injunction can be granted in advance of the settlement of their rights at law, except to prevent irreparable mischief or injury. *Mammoth Vein Coal Co.'s Appeal*, 460

68. *General principles.*—A preliminary injunction is a restrictive or prohibitory process to compel the party to maintain his status merely until the matters in dispute shall be determined; only granted (in addition to the case of invasion of unquestioned rights) for the prevention of irreparable mischief, which can not be repaired under any standard of compensation. *Id.*

69. *Past injury.*—Where defendants had run a gangway in such a direction as to cut off plaintiffs from coal which they otherwise might have taken: *Held*, a past transaction, and not to be redressed by preventive process. *Id.*

70. *Injunction when title disputed.*—A destructive trespass will be restrained by injunction, although an adverse title be asserted by the party committing the trespass. *Munson v. Tryon*, 469

71. *Jurisdiction beyond county.*—A court of equity, having the parties within its jurisdiction, may restrain by injunction a trespass upon lands lying in another county. *Id.*

72. *Incidental grounds for injunction.*—Collusion with tenant, abuse of process and purchase of unwarranted title for small consideration, considered incidentally, upon application for injunction. *Id.*

73. *Effect of answer.*—There are exceptions to the rule that the court will not decree an injunction where the material averments of the bill are traversed by the answer; but no special reason for exception appears in this case. *Lady Bryan Co. v. Lady Bryan Co.*, 478

74. *Practice as to restraining order.*—The notice required by statute of an application for injunction does not apply to the case of a temporary

INJUNCTION. *Continued.*

restraining order, nor is an appeal authorized from an order granting or refusing the latter. *Id.*

75. *Lessees enjoined and still held to their covenants.*—The lessees of a coal mine, under covenants to pay royalty in installments, in advance, upon 120,000 tons of coal, whether raised or not, to do dead work, etc., with a right of entry for breach, were enjoined from work under writ of estrepement, at the suit of a third party. The lessors then gave notice of forfeiture for breach of covenants. The lessees prayed an injunction, alleging the estrepement against them as an excuse for non-payment of rent, etc., but the court held that they were still liable under their lease; that the writ of estrepement did not work an eviction, and refused the prayer of the bill. *Schuylkill & Dauphin Co. v. Schmoele*, 480

76. *Requisites preliminary to injunction.*—No injunction ought to be allowed where the remedy is complete at law; it is granted only to prevent injury (although an account for past injury may be incident), and there must be a reasonable probability that a real injury will occur unless the writ be granted. *Sherman v. Clark*, 483

77. *Injunction to restrain transfer of stock* illegally issued by a secretary of the company may issue, but only on a proper showing of the illegality of the issue and of the proposed transfer. *Id.*

78. *Threatening to continue.*—Where the acts complained of do not make a case, it follows that a threat to continue them can not aid the matter. *Id.*

79. *Facts of the case—Insufficient showing for injunction—Claims bought with knowledge of adverse title.*—Complainant averred the discovery and the location of discovery claim, and the location of claim No. 1 on the St. Louis lode, by one Brain, in 1865, and of No. 2 by one Nichols, compliance with the mining laws, working, etc., viz.:

That complainant, in 1863, was working claim No. 1, expended large sums and disclosed a rich vein; that during that time he let a contract to Woodman on the lode, and that Woodman, though knowing the claim to belong to Brain, pretended to make a discovery and location of his own on the lode. The bill further averred that complainant was the owner of the titles of Brain and Nichols, but not stating how or when he became such owner. Defendant's answer showed the decease of Brain, and a probate court sale of Brain's interest (without notice to the heirs), and the purchase of the same by the plaintiff upon a speculating contract for \$1,000, and a twelfth interest in case of successful suit, etc., from the assignee at the probate sale; averred that the contract made between plaintiff and Woodman related to other property, long since abandoned, and denied the identity of the property sued for, and alleged that defendant had discovered and located the Emma lode in 1863; that plaintiff made no claim for the premises until 1870, when defendants had developed their great value. *Held*, no cause for injunction, because: 1. The bill did not make a sufficiently specific case, not showing how title accrued; 2. All the equities of the bill were denied, and the facts not only denied but evidently in great doubt; 3. The complainant was guilty of laches; 4. Taking the bill and answer together, it showed no case addressed to the

INJUNCTION. *Continued.*

discretion of the court, nor admitting of equitable interference. *Lyon v. Woodman*, 493

80. *Discretionary power in court.*—The granting or continuing of injunctions necessarily involves the exercise of a certain amount of discretion, the limits of which can not be fixed by any adjudged case. *Id.*

81. *Disputed title.*—An injunction to stay the working of a mine may be granted notwithstanding a question of title is involved. But the fact of the title being involved will add to the caution of the court in granting it. It is not necessary for a plaintiff to establish his title by a suit at law where it is not doubtful and not in dispute. But if disputed and in doubt, a court of equity will not settle it for him. He must show a *prima facie* case, free from reasonable doubt, and a case free from the imputation of laches. *Id.*

82. *Plaintiff's standing—Speculative purchase from ousted claimant.*—The inadequacy of price paid by plaintiff seeking an injunction, and the fact of his purchasing while the mine was in the adverse possession of other parties, considered as reasons for refusing injunctive relief addressed to the discretion of the court, and injunction refused accordingly. *Id.*

83. *Relief as between trespassers.*—It is not sufficient to show the defendant a trespasser, where plaintiff has himself no better standing. *Id.*

84. *Diversion of water enjoined to extent of requiring affirmative acts by bulk-heading tunnel.*—While excavating a tunnel for mining purposes the complainant struck a seam in the rock, from which flowed a stream of water, which it claimed and appropriated. Subsequently, defendants ran a tunnel into the mountain to a point below complainant's tunnel and drained the latter, and the defendants thereupon appropriated the water: *Held*, that complainant was entitled to an injunction to restrain such diversion and appropriation by defendants, even though it should be necessary for defendants to fill up, or build a water-tight barrier across their tunnel, to accomplish the end sought. *Cole Co. v. Virginia Co.*, 503

85. *Preliminary injunction requiring substantive act.*—In special cases a court of equity will, on a preliminary application, issue an injunction, in a restrictive form, though its obedience would require the performance of a substantive act. *Id.*, 516

86. *Answer upon information.*—Denials of the equities of a bill, if made only upon information and belief, will not justify the dissolution of an injunction, and the allegation of new matter upon information and belief is equally objectionable. *Id.*

87. *Diversion of water—First appropriator protected to extent of his original ditch.*—The plaintiff constructed a ditch whereby he appropriated part of the waters of a stream. The defendants afterward appropriated the balance. Subsequently the plaintiff dug another ditch, and diverted water thereby from the same stream. The plaintiff brought suit for an injunction, restraining the defendants from interfering with plaintiff in the use of the water. At the trial the jury returned a special verdict that

INJUNCTION. *Continued.*

the new ditch did not divert enough water to diminish the quantity appropriated by defendants. The court thereupon entered a judgment that the plaintiff is entitled to three hundred inches of water (the capacity of plaintiff's first ditch), and enjoined the defendants from disturbing the plaintiff in the use of that quantity. *Held*, that the judgment was entirely consistent with the verdict and with justice. *Higgins v. Barker*, 525

88. *Irreparable injury—Multiplicity of suits.*—Mines, quarries and timber are protected by injunction, upon the ground that injuries to and depredations upon them are, or may cause, irreparable damage, and also with a view to prevent a multiplicity of actions for damages that might accrue from a continuous violation of the rights of the owners. *West Point Co. v. Reymert*, 528

89. *No suit essential where title clear.*—It is not necessary that plaintiff's right should first be established in an action at law, the evidence in the case for the injunction showing a clear title in the plaintiff, and only a sham title set up by the trespassing defendant. *Id.*

90. *No perpetual injunction before title settled.*—Equity will not usually grant a perpetual injunction where the title is put in issue and where the evidence leaves the title still in doubt, but will grant a temporary writ till the title is settled at law; but upon the facts in this case, it was *held*, that the title was not really in issue, and the perpetual injunction was upheld. *Lockwood v. Lunsford*, 532

91. *Injunction against trespasser—Insolvency.*—Where a mere trespasser digs into and works a mine to the injury of an owner, an injunction will be granted, and especially where such trespasser is insolvent. *Id.*

92. *Effect of answer denying the equities of the bill.*—Where the answer to a bill to restrain the working of a mine, fully and fairly denies both the title and possession of complainant, no testimony being taken, and the case standing on the pleadings alone, the injunction should be dissolved until good reason appears for continuing it. The ordinary case of alleged taking of ore out of a mine claimed by complainant is no exception to this rule. *Magnet M. Co. v. Page & Panaca M. Co.*, 540

93. *Denial by answer taken as true.*—A complete denial by the answer is taken as true upon a motion to dissolve an injunction when heard upon bill and answer alone.

94. *Acquiescence in location of railroad—Lessee mining under roadbed.*—A railroad was constructed over certain lands without legal proceedings to condemn it, but without objection from the owners. Afterward proceedings to assess damages were commenced, but compromised and released. After the road was built, but before the release, coal veins undercropping the roadbed were let by the owner of the land. *Held*, that the title of the railroad company was by the original occupation without objection; that the release did not operate as an original conveyance, but as a discharge of the damages for the entry and occupation; and that the lessee of the coal took his lease subject to the right of way, and the coal company were enjoined from mining under the road. *Lawrence's Appeal*, 542

INJUNCTION. *Continued.*

95. *Irreparable injury, how pleaded.*—Where, upon an application for an injunction to restrain the defendants from working certain mining ground, and from selling any ores therefrom, the plaintiffs alleged that the injury was irreparable, from the fact that it was impossible for them to know the amount and value of the ores taken from the mine by defendant: *Held*, that the simple statement of the complaint to that effect is not sufficient, but the facts should be stated from which the court could learn that the injury was irreparable. *Leitham v. Cusick*, 546

96. *Restraining order governed by the complaint.*—A restraining order that goes further than the prayer of the complaint is improper, and should be set aside. *Id.*

97. *Practice on motion to be restored to possession.*—When the defendants have been deprived of the possession of mining ground by an officer acting under a restraining order, which was improperly issued, the judge who granted the same can not, upon application of the defendants without notice, restore them to the possession. *Id.*

98. *Stolen stock—Enjoining sale.*—A mining company having found a portion of its ground covered by the claim of another company whose stock was held only at a nominal value, bought up the entire amount of such stock; afterward such stock was lost, or as averred by the complaint, stolen, and came into the hands of parties who proceeded to control the corporation by representing such stock, and to act adversely to the company which had bought up the stock. Defendants filed no answer. The court below enjoined defendants from in any manner disposing of said stock: *Held*, that the complaint presented a *prima facie* case for relief in the discretion of the court, the exercise of which discretion in the court below should not be disturbed. *BEATTY, J.*, dissenting. *Sierra Nevada M. Co. v. Sears*, 549

99. *The discretion of the court below* in allowing injunction upon a *prima facie* case not denied by answer, will not be interfered with. *Id.*

100. *Proceedings to settle title required in aid of injunction.*—To entitle a party to injunctive relief, restraining defendants in possession from operating a mining claim, the plaintiff's title must be shown to be clear and undisputed, or it must appear that steps have been taken to establish the title at law, unless satisfactory reasons be shown for not doing so. *Telegraph M. Co. v. Central Smelting Co.*, 555

101. *Idem—The reason for rule requiring an issue at law.*—It would be gross injustice to allow a temporary injunction when upon the face of the papers it appears that a perpetual injunction could never be granted. As no perpetual injunction could be sustained on a bill to restrain the working of a mining claim without establishing the title at law, no temporary injunction should be allowed to restrain such working in the absence of any suit to try title, or of excuse for not bringing one. *Id.*

102. *Discretion.*—It is a matter largely in the discretion of the court whether, on the coming in of an answer, a preliminary injunction previously granted shall be dissolved or modified; and, except in a case of palpable error or abuse of discretion, the action of the court below will not be disturbed on appeal. *Efford v. South Pacific Co.*, 557

INJUNCTION. *Continued.*

103. *Allegations and proofs on motion for injunction.*—The rule that the proofs must correspond with the allegations, applies to the trial of a cause on its merits, and does not apply to proceedings on a *motion* for an injunction, where the answer is regarded simply as an affidavit. *Kahn v. Telegraph M. Co.*, 559

104. *Injunction against tenants in common.*—Where the defendant is in the possession of a mining claim, and is the undisputed owner of two thirds thereof, and claims the entire property under a *bona fide* claim of title, and is pecuniarily responsible for all damages that plaintiff, his co-owner, may sustain by reason of the working of the mine, an injunction will not be granted. *Id.*

105. *Right of co-tenant to injunction.*—As a general rule, the owner of a minor interest in a mining claim, out of possession, is not entitled to an injunction against the owner of the major part thereof, who is in possession and working the whole, where it does not appear that the party so in possession is unable to respond in damages to the party out of possession. *Id.*

106. *Injunction for acts already done.*—An injunction is a preventive remedy only, and can not be invoked to restrain a party from doing an act which he has already done. In such a case a party must be remitted to his remedy at law. *Id.*

107. *Technical, distinguished from destructive trespasses.*—The construction of a ditch across rocky, barren and uncultivated land is not an irreparable injury. The distinction between technical trespass and trespass going to the extent of irreparable injury, is the foundation of the jurisdiction of equity in the latter class of cases, and trespass in the former class of cases will not be enjoined, although the plaintiff's legal right to the land may not be denied, the defendants being solvent and able to respond in damages. *Thorn v. Sweeney*, 564

108. *Irreparable injury* may not be averred in terms without stating the facts which produce such result. *Id.*

109. *Evidence necessary to establish exclusive mining lease.*—One who claims an exclusive right to mine on a tract of land by virtue of an alleged parol lease, and seeks a perpetual injunction restraining others from mining thereon, though the latter do not interfere with his development of his own range, must establish such right by clear and satisfactory evidence; and the evidence in this case (for which see the opinion) is held insufficient. *Clegg v. Jones*, 572

110. *General rules applicable to injunctions.*—Injunctions are to prevent irreparable mischief and stay consequences that could not be adequately compensated; their allowance is discretionary and not of right. They call for good faith in the petitioner, and may be withheld if likely to inflict greater injury than the grievance complained of. *Edwards v. Allouez M. Co.*, 577

111. *Motives of petitioner inquired into.*—Where, by inviting an injury, one places himself in a position to call for an equitable remedy, his motives can be inquired into, even though he grounds himself on a strict legal right. *Id.*

INJUNCTION. *Continued.*

112. *Injunction to restrain a provoked injury denied.*—A man bought for speculation certain bottom lands, upon which large quantities of sand were being deposited by a stream, which operated a stamp mill higher up. He put a valuation upon the land of from three to five times what it cost him, and tried to sell it to the corporation which owned the mill, but it declined to buy. Then he prayed for an injunction to restrain the corporation from sanding his land and polluting the stream: *Held*, that an injunction would not lie, and that the speculator was entitled to such remedy as the law would give him and no more. CAMPBELL, C. J., dissented. *Id.*

113. *Ditch upon public domain not enjoined.*—Under § 2339, U. S. Rev. Stats., the defendants had the right of way for the construction of a ditch over the public domain, subject only to the liability of paying for all damages done by them to plaintiff's possession. And since the allegation of defendants' insolvency is fully denied in the answer, they ought not to be enjoined from doing upon the public domain what the paramount law declares they may do. *Rivers v. Burbank*, 583

114. *Flooding ditch—Defendants jointly enjoined though not jointly responsible for damages.*—The owners of a drain ditch recovered a judgment for damages against the several owners of distinct parcels of land, in an action for the wrongful flowing of waste water from such land, to the injury of the ditch, and also obtained an injunction which bound the defendants to so regulate the irrigation of their lands as not materially to injure the drain ditch of plaintiffs below their respective lands: *Held*, on appeal, that a motion for nonsuit ought to have been sustained on the ground that where two or more parties act, each for himself, in producing a result injurious to plaintiffs, they can not be held jointly liable for the acts of each other; but also, *held*, that if the plaintiffs would remit their judgment for damages, the decree ordering an injunction should remain. *Blaisdell v. Stephens*, 599

115. *Oil pipe line over railroad track—No injunction against nominal trespass to aid a competing oil carrier.*—The Central Railroad Company purchased the fee simple title to a tract of land in Bayonne. The railroad track was laid across the land in a cut sixteen feet deep; the city subsequently condemned a street across the cut, and a bridge was built over it by the company, though paid for by the city. Subsequently the city granted, by resolution, to the Standard Oil Company the right to lay pipes in the street. The oil company laid its pipes, not only in the street, but alongside of the bridge, and on a level with it. The railroad company applied for a preliminary injunction to prevent resistance to the removal of the pipes along the bridge, which was refused, because,

1. The pipes had been laid when the bill was filed.
2. The case presented did not show a threatened infliction of irreparable injury.
3. The claim that the pipes were supported by the bridge, and thereby imposed upon it an unwarranted servitude, is denied by the oil company, and is, at most, a subject of dispute.
4. The complainants have no claim to protection against lawful competition in the transportation of oil.

INJUNCTION. *Continued.*

5. The defendants do not appear to have been actuated by disregard of the power of the court. *Central R. R. Co. v. Standard Oil Co.*, 604

116. *Lease of brick field—Mandatory injunction to restore fence.*—Where the lessee of a brick field, contrary to the covenants in his lease, caused the fall of one of the fences bounding the field, by excavating the clay from under it: *Held*, that a mandatory injunction in a negative form should be granted to compel the restoration of the fence to its former condition. *Newton v. Nock*, 611

117. *Injunction to prevent drowning of colliery.*—The court has power to enjoin a party from discontinuing pumping at a colliery and prevent its being drowned out, pending a case for specific performance of contract for lease; but it will not exercise that power when the pumping has already been a long time discontinued. *Strelley v. Pearson*, 618

118. *Oil pipe line in river, under drawbridge.*—The defendants, a foreign corporation, without authority laid a pipe for the transportation of oil in the channel of the Hackensack river, under the draw of the railroad bridge of the complainants, upon lands belonging to the State. A preliminary injunction to prevent the defendants from interfering with complainants by laying pipe was denied, because,

1. The pipe was laid when the bill was filed.

2. It was so laid as not to interfere with the use and maintenance of the bridge.

3. The lands whereon the pipe is laid belong to the State, and it does not complain of any purpresture.

4. The complainants have no monopoly for the transportation of oil, and besides, the defendants intend only to transport their own goods. *New Jersey Co. v. Standard Oil Co.*, 625

119. *Practice on appeal—Stay refused pending appeal from order denying injunction.*—Complainants having applied for a preliminary injunction to prevent defendants from interfering with the removal of an oil pipe line, which crossed the complainants' railroad track, obtained an *ad interim* stay prohibiting the defendants from using the pipe for the conveyance of oil. The injunction being refused, the temporary stay was also dissolved. The complainants appealed from the order refusing the injunction, and pending the appeal moved to continue the *ad interim* stay: *Held*, that the question of continuing the order was in the discretion of the court; that it did not appear that any irreparable injury would be done if the stay was not continued; and that the preliminary injunction having been refused, it was also the duty of the chancellor to refuse to continue the stay, which had only been granted as a prudential interference. *Central R. R. Co. v. Standard Oil Co.*, 629

120. *Complainant ousting defendant after order of court enjoining defendant's mining.*—Where a complainant, out of possession, after obtaining an injunction to restrain the working of a mine by a defendant in possession, thereupon proceeded to oust the defendant, he was compelled, by order, to restore such possession to the defendant, and it was *held further*, that where the object of the writ was to preserve the property pending the litigation, the attempt by complainant to prevent the ac-

INJUNCTION. *Continued.*

complishment of such object was a gross abuse of the process of the court, and might be considered as grounds for dissolving the writ, but that a violation of the spirit of the injunction by a complainant could not be considered as a contempt of court. *Vanzandt v. Argentine M. Co.*

635

121. *To stop the working of a mine by injunction* is against public policy and private justice where a receivership is practicable. *Falls v. McAfee*,

639

122. *Injunction staying proceedings at law*.—Although the district courts have both equity and common law jurisdiction, yet the practice should be the same as if their different powers were conferred upon separate and distinct courts; and the proper method of procuring the postponement of the trial of an action at law, upon the ground that a suit is pending in chancery which will be decisive of the action at law, is by injunction from the court of chancery to stay proceedings at law. *Gear v. Shaw*,

643

123. *Special appearance*.—A court of chancery where the sole object of a bill filed is to obtain an injunction, will not allow that object to be resisted without holding the defendant to a general appearance in the action. *Thornburgh v. Savage M. Co.*,

667

See ACCOUNT, 1, 2; AFFIDAVIT, 1, 2, 3; CONTEMPT, 1; CORPORATION, 3; EMINENT DOMAIN, 1; INSOLVENCY; LACHES, 3; NOTICE.

INJUNCTION BOND.

1. *Want of probable cause*.—In action upon a bond conditioned to indemnify the defendants in an injunction cause "for all damages they might sustain by the wrongful suing out of an injunction" to stop their working of a certain gold mine, it is necessary for the plaintiffs to show a want of probable cause for the suit brought for injunction; and also in a legal sense, malice in bringing it. *Falls v. McAfee*,

639

2. *Malice negatived*.—Where the party who sued out the injunction really and *bona fide* entertained the belief that he had just grounds for his suit, the idea of malice is negatived, and the action upon the bond can not be supported. *Id.*

3. *Action on bond—Nominal damages not to bar proper assessment*.—In an action on a bond with a condition, there was a verdict for the penal sum and one cent damages, and judgment was entered awarding execution for the entire sum: *Held*, erroneous, and that execution could not be awarded until the damages had been assessed as provided by statute; that a subsequent assessment of damages and award of execution pursuant to the statute cured the error; and that the assessment of nominal damages by the first jury could not be considered as a determination of the extent of the plaintiffs' claim. *Gear v. Shaw*,

643

4. *Damages on dissolution of injunction—Sudden increase in product of the mine*.—An injunction was granted to restrain parties from mining, and, some time after its dissolution, a new discovery was made, and a large quantity of ore raised from it. In assessing damages on the injunction bond, *Held*, proof that the use of the money for which the mineral might have been sold was worth to the parties more than legal interest,

INJUNCTION BOND. *Continued.*

by way of enhancing the damages, should be rejected as ideal and speculative; and so, too, as to the proof of the subsequent discovery as tending to show what the parties might have realized had they continued mining, and the injunction had not been granted. *Id.*

5. *Idem.*—Damages upon the dissolution of an injunction are to be estimated with reference to the business of the party enjoined, and his profits at the time of the service of the writ, and not upon conjecture founded upon subsequent events not then known or contemplated. *Id.*

6. *Counsel fees, etc., as damages.*—Counsel fees and expenses of defending the chancery suit are not a proper item of damages, to any greater extent than they were necessarily incident to or caused by the injunction. *Id.*

7. *Demand need not be proved.*—In an action upon an injunction bond it is not necessary for the plaintiff to prove a previous demand for his damages. *Id.*

8. *Oath of jury.*—In assessing damages on a bond with a condition, after a finding that there has been a breach, it is correct to swear the jury to well and truly inquire of and assess the plaintiffs' damages. *Id.*

9. *Measure of damages where building tramway had been enjoined.*—Morgan sold to Negley certain coal in place, with privilege to shift the incline and railroad from the pits. Negley commenced the road, but at Morgan's suit was restrained by injunction, which was afterward dissolved. Negley, without constructing the road, sold to another, and brought suit on the injunction bond: *Held*, that the difference between the cost of constructing the road when the injunction was laid and when it was dissolved, was speculative and consequential, and should not have been submitted to the jury. *Morgan v. Negley*, 653

10. *Idem.*—Had the property continued in the hands of Negley, and he had finished the road at increased cost, it would have been a proper item of damages. *Id.*

11. *Measure of damages.*—In a suit upon an injunction bond in aid of a writ restraining defendants, who were three miners, and were prevented from working their placer claim for sixty days, the value of their labor, proved to be \$18 per day for the three men, allowed as proper damages. *Campbell v. Metcalf*, 656

12. *Idem—Counsel fees.*—In suit upon an injunction bond given in support of a writ to prevent the working of mining ground, fees paid to counsel for services rendered in the trial of title are not recoverable. The recovery is restricted to the services of counsel in procuring the dissolution of the injunction. *Id.*

13. *Measure of damages—Expenses in protecting the mine.*—Money alleged to have been paid in the employment of men to hold a mine, so as to prevent it from being "jumped" during the existence of an injunction against working it, is not a legitimate item of the damages covered by the injunction bond sued upon. *Streeter v. Marshall Silver M. Co.*, 660

14. *Idem*—It is a fundamental rule that no damages can be allowed which are not the actual, natural and proximate result of the wrong committed. *Id.*

INSOLVENCY.

1. *Test of insolvency.*—The test of the insolvency of the principal debtor is what might be recoverable by process—not what it might be supposed he would do voluntarily. *Janes v. Scott*, 181
 2. *Insolvency and laches* considered in their incidental relations to bill seeking injunction. *Irwin v. Davidson*, 237
 3. *Averment of insolvency, when unnecessary.*—When the injury goes to the destruction of the substance of the estate, which can not be specifically replaced, no allegation of insolvency is necessary to sustain an injunction. *More v. Massini*, 455
 4. *Where irreparable injury* or inadequate relief at law is alleged, insolvency of the defendant need not be superadded. *Sierra Nevada M. Co. v. Sears*, 549
- See GUARANTY, 2; INJUNCTION, 24, 38, 43, 64, 91.

INSPECTION.

1. *View of mine with use of means of access.*—Where the question at issue was the identity of the lode claimed by plaintiff with the lode claimed by the defendant, which could only be determined by inspection of underground developments of the mine in possession of the defendants: *Held*, that it was a proper case for an order of inspection, and the order was made, allowing view and survey of the mine by the complainant, with his attendants and witnesses not to exceed nine in number, during five successive days, the defendant being commanded to furnish all means of ingress and egress and means of traversing the mine. *Thornburgh v. Savage M. Co.*, 667
 2. *Before granting an order for the inspection of a mine*, the court must be satisfied that the application is made in good faith, and in granting it will pay due regard to the convenience of the party affected. But a court of equity has the power to make and enforce an order of this kind, and where the facts to be determined can not be discovered except by inspection of a mine in the possession of the defendant, and accessible only by a deep shaft and machinery, it would be a denial of justice to refuse it. *Id.*
 3. *Obstructions—Ventilation.*—Order for inspection of coal mines, the defendant being compelled to remove obstructions and to open the air courses. *Earl of Lonsdale v. Curwen*, 693
- See INJUNCTION, 13.

IRRIGATION—See FRAUD, 22.

JUDGMENT—See PLEADING AND PRACTICE, 18.

JURIES—See PLEADING AND PRACTICE, 10.

JURISDICTION.

1. *Jurisdiction of U. S. courts in chancery.*—The jurisdiction of the circuit court of the United States is limited to certain persons and subjects; but within those limits it is complete and full; and in giving the relief prayed for it has all the powers of the English High Court of Chancery. *U. S. v. Parrott*, 336
2. *Tort-feasor beyond jurisdiction not a necessary party.*—In an ac-

JURISDICTION. *Continued.*

tion against joint and several tort-feasors to restrain the diversion of water, if one of the defendants resides beyond the jurisdiction of the court, so that he can not be served with process and does not voluntarily appear, the bill may be amended by omitting his name, and the court will exercise jurisdiction as to the remaining defendants. *Cole Co. v. Virginia Co.*, 503

3. *Waiving place and mode of trial.*—A defendant who is entitled to a trial in a certain county by a jury waives these rights by submitting to a trial by the court in a different county. *West Point Co. v. Reymert*, 528

4. *Jurisdiction of U. S. courts over foreign corporations.*—A corporation, organized in the State of California, but owning and working mines in Nevada, having agents who are served with process in Nevada, is a person found in the district within the meaning of the Judiciary Act of 1789. *Thornburgh v. Savage M. Co.*, 667

5. *Idem—Service in such cases.*—A corporation, organized in California, but owning and operating mines in Nevada, is subject to all the liabilities growing out of its mining business or its ownership of mining property, and can be reached by process of the circuit court, by service upon its resident managers, under section 29 of the Practice Act of Nevada, adopted by the rules of the United States Circuit Court; and such corporation is a body politic within the State of Nevada. *Id.*

See INJUNCTION, 43, 71; PARTIES, 2, 8; PLEADING AND PRACTICE, 9.

LACHES.

1. *Right to rescind, lost by delay.*—Where there is undue delay in the offer to rescind a contract, and the value of the stock which should have been tendered on the discovery of the fraud, has meanwhile declined, it amounts to an affirmation of the contract, and the right of rescission is lost. *Leaming v. Wise*, 41

2. *Standing by.*—It was in proof that defendants knew of the direction and extent of plaintiffs' work, which they allowed to be continued without objection; even if this fact were only doubtful it would be sufficient to defeat an injunction, for they should have been on their guard to prevent the expenditure of money on what they meant should not be realized upon by the parties expending it. *Mammoth Vein Coal Co.'s Appeal*, 460

3. *The delay of two years in bringing suit for injunction* to restrain the working of a mine, is a fact seriously affecting the claim for an injunction. *Lyon v. Woodman*, 494

4. *Laches in obtaining possession.*—If a party undertakes to subject to his dominion any portion of the public domain, the law will protect him in his possession, if he pursues the work of inclosing the tract with reasonable diligence; but in this case the plaintiff, having failed to show any effort on his part to subject the land to his control for a period of two years, was held to have shown an inexcusable want of diligence. *Rivers v. Burbank*, 584

See INJUNCTION, 12, 63; INSOLVENCY, 2; STOCK, 1.

LEASE.

1. *Lease implies covenant for quiet enjoyment, but not against tortfeasors.*—Every lease implies a covenant for quiet enjoyment. But it extends only to possession, and its breach arises only from eviction by means of title. It does not protect against entry and ouster by a tortfeasor, nor even against the assertion of the right of eminent domain. *Schuylkill & Dauphin Co. v. Schmoele*, 480

2. *Idem*—An action of ejectment followed by a writ of estrepement is no breach of the covenant; and this result is not produced until it reaches actual or virtual eviction. *Id.*

3. *Parol lease—Statute of Frauds.*—Whether a parol lease, without expressed limit of time, if established by clear and equivocal proof, would be valid under the Statute of Frauds, as a lease for one year, and whether it would be renewed from time to time by payment of rent, not considered; but it seems that Ch. 260 of 1860, amended by Ch. 117 of 1872, does not affect the case. *Clegg v. Jones*, 579

4. *Covenant to work to fullest extent.*—A covenant in a lease binding the lessee to "get the demised clay to the fullest practicable extent consistent with the means of sale of bricks and tiles to be made therefrom," does not bind the lessee to go on working at a loss, even though a means of sale, at an unremunerative rate, might have been found for bricks made out of the demised clay. *Newton v. Nock*, 611

5. *Usual covenants.*—Independent of special custom, a clause in a lease allowing the lessee to determine the lease when the mines demised are incapable of being worked to a profit, is not a clause usually inserted. *Strelley v. Pearson*, 618

6. *Practice as to settling terms of lease.*—On reference to chambers, to settle the terms of a lease, the court will, when convenient, make a declaration as to the insertion of a particular clause with regard to which an issue has been raised in the pleadings. *Id.*

See FRAUD, 30; INJUNCTION, 29, 67, 75, 109, 116.

LICENSE.

1. *Licensee after revocation is a trespasser.*—One engaged in mining under a revocable license which license has been revoked, becomes a mere trespasser if he continues to mine after the revocation. *Lockwood v. Lunsford*, 532

See INJUNCTION, 10; PUBLIC DOMAIN, 4.

LODE—See FRAUD, 13.

MANDAMUS—See CONTEMPT, 1; INJUNCTION, 34.

MEASURE OF DAMAGES.

1. *Execution of bond—Recital.*—Where G. and N. executed a bond for an injunction in which it is recited that G. had applied for the writ as the agent of H., but the bond was signed and sealed by G., without other reference to H.: *Held*, that the description of himself as agent in the body of the instrument did not exclude his personal liability. *Gear v. Shaw*, 643

See INJUNCTION BOND; TRESPASS, 2.

MERGER.

1. *A note is not merged in an agreement which does not by its terms or by legal intent defeat a right of action thereon. Creighton v. Vanderlip,* 172

MINES—See **CONSIDERATION**; **FRAUD**, 14.

MINERALS—See **PUBLIC DOMAIN**, 2, 5.

MISTAKE—See **AFFIDAVIT**, 1.

MORTGAGE.

1. *Mortgagee in possession—Tender.*—If plaintiff be a mortgagor, and the defendant a mortgagee who alleges there is still a subsisting claim against the property, though an injunction may be granted to stay a wanton or improvident waste by the mortgagee in possession, yet the plaintiff must, before he entitles himself to relief, bring into court the amount due, or offer so to do. *Irwin v. Davidson,* 237
2. *Mortgagor may continue mining.*—A charge of waste, whereby the mortgage security is diminished, is always a sufficient ground for an injunction, as between mortgagor and mortgagee; but when the property was purchased and is occupied for mining purposes, use of the property in mining operations can not be considered waste. *Capner v. Flamington M. Co.,* 264
See **INJUNCTION**, 14.

NEW TRIAL.

1. *New trial, when not allowed, on reversing judgment.*—No probability appearing that the evidence would be materially different on a new trial, this court, on reversing a judgment for the plaintiffs, directs a dismissal of the complaint. *Clegg v. Jones,* 572

NOTICE.

1. *Notice required by statute.*—An order refusing an injunction will not be disturbed on appeal if the record fails to show a notice of the application or an order to show cause as required by statute. *Lady Bryan M. Co. v. Lady Bryan M. Co.,* 478
2. *Judicial notice of suits affecting the mine.*—In applications for injunction a judge may take judicial notice of the files of his own court showing suits involving the legal title to the property. *Lyon v. Woodman,* 494
3. *Order without notice vacated.*—An injunction granted at chambers without notice may be dissolved without notice. *Leitham v. Cusick,* 546

NONSUIT—See **PLEADING AND PRACTICE**, 6.

NOTICE—See **INJUNCTION**, 15, 21.

OIL—See **INCORPOREAL HEREDITAMENTS**, 1; **INJUNCTION**, 115, 118.

ORE—See **INJUNCTION**, 50.

PARTIES.

1. *Necessary parties—Non-residents.*—The general rule in a court of equity is that all persons interested in the object of the bill are necessary and proper parties. There are exceptions to the rule as, *e. g.*, parties not within the jurisdiction; and where such parties are not indispensable the bill will be retained. *U. S. v. Parrott,* 336

PARTIES. *Continued.*

2. *Parties beyond jurisdiction.*—A person who resides beyond the jurisdiction of the court, although named as a defendant in the bill, is substantially not a party to the action until he is served, or till he appears. *Cole Co. v. Virginia Co.*, 503

3. *Parties beyond jurisdiction—Severable interests.*—It is a general rule in equity that all persons materially interested in the matter in controversy should be made parties, in order that complete justice may be done and a multiplicity of suits be avoided. If, however, some of the parties reside beyond the jurisdiction of the court, and the interests of those present are severable from the interests of those absent, the court will proceed to a decree. *Cole Co. v. Virginia Co.*, 516

See INJUNCTION, 4; JURISDICTION, 2; TRUST, 1.

PARTNERSHIP—See TENANT IN COMMON.

PATENT—See AGENT, 3.

PERSONAL LIABILITY.

1. *Personal liability of directors.*—Directors do not become personally liable for the fraud and misrepresentations of the active managers of a corporation from the mere fact of their holding such office in the company. Knowledge of or participation in the guilty act must be brought home to the person charged. *Arthur v. Griswold*, 46

2. *No personal responsibility for fraud of associates.*—The fact, therefore, that a defendant's name was published as trustee, and stock issued to him, do not make him responsible for a fraud carried out by other trustees and agents of the corporation. *Id.*

PLEADING AND PRACTICE.

1. *Several action.*—Other persons purchased stock at the same time as the plaintiff, and under like circumstances: *Held*, the several contract of each, and that upon rescission the defrauded party alone was entitled to recover. *Burns v. McCabe*, 1

2. *Misjoinder—Sundry counts—Facts of the case.*—Plaintiff sued five persons, all trustees of the corporation; one of the two counts on which he went to the jury was based upon alleged fraudulent representations by which plaintiff was induced to make loans to the company; the other count was upon the statute making officers personally liable for making false reports. The evidence would have justified a verdict against four of the defendants who had signed the report, but the fifth was not liable on that count because he had not signed the report, and was not liable under the other evidence upon the first count: *Held*, that a new trial must be had as to all the defendants. *Arthur v. Griswold*, 46

3. *Variance.*—A party can not make out one case by his bill and another by his proof; they must correspond. *Tuck v. Downing*, 84

4. *Appeal to Supreme Court from judgment on demurrer.*—Where a demurrer to a petition in a suit in equity is sustained in the district court, the cause may be taken by appeal to the Supreme Court. *Arnold v. Baker*, 111

5. *Review of evidence in chancery case.*—In a suit in chancery where the evidence has been taken before a master, the appellate court will ex-

PLEADING AND PRACTICE. *Continued.*

amine into the entire record, and affirm or reverse the decree of the court below upon principles of equity, as the facts will justify. *Jackson v. Allen*, 127

6. *Nonsuit—Shifting position in appellate court.*—The ruling that a compulsory nonsuit may be allowed, affirmed; but a defendant asking nonsuit on specific grounds below, can not shift his position on appeal. If the evidence does not justify a verdict, or if a verdict found would be set aside by the court, a nonsuit ought to be granted. *Mateer v. Brown*, 156

7. *Conveyance, pending trial.*—Where plaintiffs have parted with their interest in the subject-matter, the suit can not proceed until the proper parties are substituted, if the objection be insisted on. *Boyle v. Laird*, 301

8. *General relief.*—General relief should not be granted on a bill praying only the issuance of an injunction. *Id.*

9. *Plea to jurisdiction.*—When the want of jurisdiction is not patent on the record the proper mode to take advantage of it is by plea. *Fremont v. Merced M. Co.*, 332

10. *Form of finding and decree upon the issue of citizenship submitted to a jury.* *Id.*

11. *Waste and ejectment, being legal remedies, can only be maintained by the owner of the legal title—not by the cestui que trust.* *Gillet v. Treganza*, 432

12. *Prayer determines nature of action under code.*—In actions brought since the adoption of the code, it is a general rule that the nature of the action is to be determined by the prayer for relief; and this rule may be safely adopted in cases of doubt. *Id.*

13. *Verdict upon matter not in issue.*—The court instructed the jury: "The answer in this case admits that defendants have extracted gold of the value of \$1,000 from the ground claimed by plaintiffs, * * and if the jury believe from the evidence that plaintiffs, at the time of the alleged trespass, were entitled to the possession of such ground, they should find a verdict in favor of plaintiffs for \$1,000 damages." *Held*, that because the jury found a verdict for one instead of one thousand dollars, we are not therefore to conclude that they did not find that the plaintiffs were entitled to the mining ground in dispute. There was no issue upon the question of damages, and that part of the verdict was upon a matter not properly before the jury. *McLaughlin v. Kelly*, 446

14. *The Practice Act of California abolishes all forms of action, and under it we must look solely to the material facts put in issue by the pleadings, to ascertain what was in fact determined by the findings of the court or the verdict of the jury.* *Id.*

15. *Verification—Information and belief.*—A verification which conforms to section 113 of the Practice Act of Nevada is sufficient, and that implies that averments may be made upon information and belief. *Sierra Nevada M. Co. v. Sears*, 549

16. *To a count of a declaration upon a bond, non est factum* is the appropriate plea, but *nil debet* is proper where the bond is set forth merely as inducement. *Gear v. Shaw*, 643

PLEADING AND PRACTICE. *Continued.*

17. *Defendants for whom no appearance is entered.*—Where counsel, in the first of a series of pleas filed, expressly designate the defendant for whom they appear, the words, "the defendants" in the subsequent pleas must be referred to the defendants named in the first plea, and can not fairly be held to be an appearance for a defendant served, but not named in the first plea. There being no appearance for such defendant it is error to enter final judgment against all the defendants, without first entering judgment by default against the one for whom there is no appearance. *Streeter v. Marshall S. M. Co.*, 660

18. *An entire judgment, if reversed* as to one defendant, must be reversed as to all. *Id.*

See AFFIDAVIT, 2; INJUNCTION BOND; JURISDICTION; NEW TRIAL.

POSSESSION.

1. *Possession of the subject of controversy is property.* *Brennan v. Gaston*, 426

2. *Recorded surveys evidence of possession—Burden of proof.*—Under the statutes of Nevada, in order to make certain surveys evidence of possession, it is a condition precedent that the surveyor's certificate should be recorded within thirty days from the date of its delivery, and the burden of proof is, in this case, held to be upon the plaintiff to show that the certificates were recorded in time. *Rivers v. Burbank*, 584

3. *The rule that possession of a part is extended by construction* to the whole of lands called for in paper title, does not apply to claims on the public domain held under an inoperative deed. *Id.*

4. *Possession of public land—Insufficient boundaries.*—Plaintiff claimed to be in possession of a tract of public land, through which the defendant dug a ditch. The land was used chiefly for grazing purposes, the boundaries very imperfectly marked, and cattle belonging to strangers were allowed to graze with those of the plaintiff upon the land: *Held*, that the testimony set forth in the opinion was insufficient to show that plaintiff had possession of the land over which the ditch was dug. *Id.*

See EJECTMENT, 2; INJUNCTION, 18, 57, 66, 97; LACHES, 4.

PRINCIPAL AND SURETY—See INJUNCTION, 52.

PROSPECTUS.

1. *Responsibility for prospectus.*—A director of a corporation who knowingly issues or sanctions the circulation of a prospectus containing material mis-statements is liable in damages to a party induced to purchase stock by the contents of such prospectus. *Morgan v. Skiddy*, 74

See FRAUD, 4.

PUBLIC DOMAIN.

1. *Liberal construction of the statutory grant.*—The grants to miners under the act of Congress are to be liberally construed in favor of the grantee. *Robertson v. Smith*, 196

2. *The right to explore the mineral lands* implies the right to extract the minerals when found. *Id.*

PUBLIC DOMAIN. *Continued.*

3. *The fee in possessory claims* remains in the United States, but the rights of miners have been carved out of it. *Id.*

4. *Implied license; right of holder to protect his claim.*—Under the legislation and implied license of the State and of the United States, the owner of a mining claim has a good vested title to the property, and it should be so treated until his title is divested by the exercise of the higher right of the superior proprietor; and in the meantime his right to protect the property is as full and perfect as if he were the tenant of the superior proprietor. *Merced M. Co. v. Fremont,* 313

5. *Title of the U. S. in minerals.*—Under the treaty of Guadalupe Hidalgo, the United States acquired title to the minerals, and they have not dedicated them to the public. *U. S. v. Parrott,* 336

See CLAIM; POSSESSION.

QUARRIES—See INJUNCTION, 11, 83.

QUO WARRANTO.

1. *Usurpation of office, etc.*—The right to an office in a company can not be tried on application for injunction, nor can it restore an officer to his position, nor can it remedy the removal of a company officer after the removal has been already made. *Sherman v. Clark,* 483

RAILROADS—See INJUNCTION, 94, 115.

RECEIVER—See INJUNCTION, 121.

RES ADJUDICATA.

1. *Effect of verdict.*—If in an action of trespass the jury find generally for the plaintiffs, it concludes the parties upon all questions material to the recovery of plaintiffs, which are distinctly put in issue. *McLaughlin v. Kelly,* 446

RESCISSION.

1. *No recovery of purchase price with rescission.*—There can be no action by the defrauded against the guilty party for the direct recovery of the entire consideration paid, until after complete and prompt rescission; and though rescission be impossible (unless prevented by the guilty party) the rule remains the same. *Getty v. Devlin,* 29

See ESTOPPEL; FRAUD; LACHES, 1.

RESERVATION.

1. *Reservation may operate as exception.*—A reservation in a deed will not give title to a stranger, but it may operate, when so intended by the parties, as an exception from the thing granted, and as notice to the grantee of adverse claims as to the thing excepted or reserved. *West Point Co. v. Reymert,* 528

SEVERANCE.

1. *Rights of lord of the manor.*—Though the property in the minerals be in the lord of the manor, it does not follow that he can enter and take them without consent. *Grey v. Duke of Northumberland,* 251

STATUTE OF FRAUDS—See LEASE, 3.

STATUTE OF LIMITATIONS—See ADVERSE POSSESSION.

STOCK.

1. *Diligence in notifying purchaser of loss of stock.*—The question whether a party who has lost stock by theft, as alleged, has used due diligence to prevent loss to third parties, can not arise before defendant shows himself to be an innocent purchaser for value. *Sierra Nevada M. Co. v. Scars*, 545

See INJUNCTION, 77, 98.

TENANT FOR LIFE—See TIMBER, 1.

TENANT IN COMMON.

1. *Co-tenants not partners.*—A mere co-tenancy does not establish a partnership so as to establish a relation of trust and confidence. *Tuck v. Downing*, 84

See INJUNCTION, 104, 105.

TENDER.

1. *Tender of deed into court.*—Making and filing with the clerk, of a deed of release, after suit brought, allowed in this case. *Burns v. McCabe*, 1

See MORTGAGE, 1.

TIMBER.

1. *Tenant for life.*—Tenant for life, liable to waste, having sold timber can not prevent the vendee from cutting it. *Wentworth v. Turner*, 249

TIME.

1. *Reasonable time a question of law.*—Where the facts are undisputed, what is a reasonable time or an undue delay is a question of law for the court. *Leaming v. Wise*, 41

TRESPASS.

1. *Party leasing lands of stranger liable for the rents.*—Where coal is mined by lessees of persons claiming to be owners of the same, the real owners may waive the tort and sue the lessors for the rental received by them, as money had and received. *Hawesville v. Hawes*, 193

2. *Measure of damages in trespass by plaintiff out of possession.*—A person disseized of a mine can not maintain trespass, except for the entry and ouster, in which case damages would be restricted to the entry and ouster; but damages for a continuance of a trespass can be recovered only after the party disseized has regained possession. *Bracken v. Preston*, 267

See ASSIGNMENT, 2; CORPORATIONS, 5; INJUNCTION; LICENSE, 1.

TRUST.

1. *Variance—Cestui que trust suing as if he held the fee.*—Although the equitable owner may be entitled to have the waste of his land enjoined, such relief can not be granted in an action where he claims to hold the legal title and proves only an equitable estate. *Gillett v. Treganza*, 432

See FRAUD, 15.

TUNNEL—See INJUNCTION, 84.

VENDOR AND PURCHASER—See AGENT, 1; CONSIDERATION; FRAUD;
RESCISSION.

VENTILATION—See INSPECTION, 3.

VERDICT.

1. *Jury finding in equity case.*—The verdict of a jury in equitable actions is but advisory; the court of appeal reviews the whole evidence, and the instructions to the jury are immaterial. *Law v. Grant*, 57

2. *Verdict in equity not conclusive.*—In an equitable action a verdict has not the same conclusive weight as in an action at law; and, on appeal from a judgment pursuant to such verdict, this court reviews the evidence. *Clegg v. Jones*, 572

See BOND, 1; PLEADING AND PRACTICE, 13; RES ADJUDICATA.

WARRANTY—See CONSIDERATION.

WASTE—See INJUNCTION; PLEADING AND PRACTICE, 11.

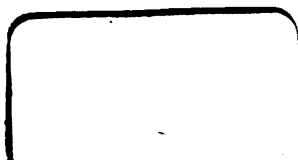
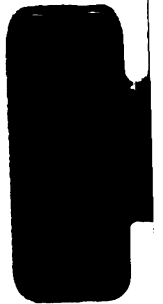
WAY—See HIGHWAYS.

VOL. VII.—47

Standard Law Library



3 6105 06 033 384 1



Stanford Law Library



3 6105 06 033 384 1